No. 87-1295-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Andrew Sokolow

Docketed:
February 2, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Goldberg,Robert P.

NOTE: 12/30/87 ext. until 2/2/88 by O'Connor, J-cited

Entry	Date	Note	Proceedings and Orders
1	Dec 21 1987		Application for extension of time to file petition and order granting same until February 2, 1988 (O'Connor, December 30, 1987).
2	Feb 2 1988	G	Petition for writ of certiorari filed.
3	Feb 2 1988		Appendix of petitioner filed.
5	Mar 8 1988		Order extending time to file response to petition until April 2, 1988.
6	Mar 30 1988		Brief of respondent Andrew Sokolow in opposition filed.
7	Apr 6 1988		DISTRIBUTED. April 22, 1988
8	Apr 15 1988	X	Reply brief of petitioner Andrew Sokolow filed.
9	May 17 1988		REDISTRIBUTED. June 2, 1988
10	Jun 6 1988		Petition GRANTED.
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11	Jul 21 1988		Brief of petitioner United States filed.
12	Jul 21 1988		Joint appendix filed.
14	Aug 8 1988		Order extending time to file brief of respondent on the merits until September 21, 1988.
15	Aug 23 1988		Record filed.
		*	Certified copy of original record and proceedings, 6 volumes, received.
16	Sep 21 1988		Order further extending time to file brief of respondent on the merits until September 26, 1988.
17	Sep 26 1988		Brief of respondent Andrew Sokolow filed.
18	Oct 7 1988		CIRCULATED.
19	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 10, 1989. (1st case) (1 hr.)
20	Oct 25 1988	X	Reply brief of petitioner filed.
21	Jan 10 1989		ARGUED.

87 No. 1295

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a reasonable suspicion that a person is engaged in narcotics trafficking can be based on a commonsense analysis of all the information in the officers' possession, or whether it must be based on at least one factor that constitutes direct evidence of an ongoing crime, plus circumstantial evidence that can be considered only if its significance is verified by empirical or statistical evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OCTOBER TERM, 1987

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App. 1a-33a) is reported at 831 F.2d 1413. The initial opinion of the court of appeals, as amended (App. 34a-46a), is reported at 808 F.2d 1366. The other orders and opinions in the case, including the order of the court of appeals remanding the case for additional factual findings (App. 50a-51a); the opinion of the district court on remand from the court of appeals (App. 47a-49a); the order and opinion of the district court denying respondent's motion to suppress (App. 52a-55a); and the magistrate's report and recommendation (App. 56a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (App. 1a). On December 30, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1988.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following the denial of a motion to suppress evidence in the United States District Court for the District of Hawaii, respondent entered a conditional plea of guilty to the charge of possessing cocaine with the intent to distribute

[1] Along with a petition for rehearing, we submitted a suggestion for rehearing en banc. As of the date of the filing of this petition, the court of appeals has not acted on our en banc suggestion. The time within which to file a petition, however, runs from the date of the denial of a rehearing petition, not from the date of the denial of a suggestion for rehearing en banc. Sup. Ct. R. 20.4. Because the court of appeals denied our rehearing petition on November 4, 1987, in a new opinion that substantially changed the rationale for the court's decision, we filed a supplemental petition for rehearing with a suggestion for rehearing en banc, which is still pending before the Ninth Circuit. We will advise the Court of any further action by the court of appeals that may affect the disposition of this petition.

it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment to be followed by a special parole term of three years. The court of appeals reversed by a divided vote.

1. On July 22, 1984, respondent approached the United Airlines ticket counter at the Honolulu airport.[2] Respondent appeared to be roughly 25 years old; he was wearing a black jumpsuit and a great deal of gold jewelry; and he was accompanied by a woman. He purchased two round-trip tickets to Miami in the names Andrew Kray and Janet Norian with an open return. The price of the tickets was $2100. Respondent paid for the tickets with cash from a large roll of $20 bills that he handed to the ticket agent. The agent counted out $2100, which depleted the roll by about half, and returned the rest of the roll to respondent. Neither respondent nor his companion checked any luggage, although they had four bags with them. Upon request, respondent gave the ticket agent a telephone number. The agent noticed that respondent seemed nervous while he was buying the tickets. App. 2a, 56a; 9/22/86 Tr. 16-18.

After respondent left for his flight, the ticket agent told Officer John McCarthy of the Honolulu Police Department about respondent's cash purchase of the tickets. Officer McCarthy, who was a member of the Department's Airport Task Force, checked the telephone number that respondent had left with the ticket agent and learned that it was listed to a "Karl Herman"; McCarthy was unable to

[2] The facts were developed at suppression hearings conducted by the magistrate and the district court on three separate days. In addition, the parties stipulated to the facts contained in the affidavits of Honolulu Police Officer John McCarthy, which were filed in support of the several search warrant applications in this case. 11/21/84 Tr. 2-3.

find any Hawaii listing under the name "Andrew Kray."[3] The ticket agent identified respondent's voice on a recorded message at the telephone number respondent had left. App. 2a-3a, 56a-57a; 9/22/86 Tr. 18-19, 23; McCarthy Aff. 1.

Officer McCarthy subsequently learned that respondent and Norian were scheduled to return to Honolulu on July 25, three days after they had left. He also learned that on the way back from Miami, they were scheduled to make stopovers in Denver and Los Angeles. On the return trip from Miami, narcotics agents spotted respondent in a waiting area at the Los Angeles airport. They noticed that he "appeared to be very nervous and was looking all around the waiting area" (9/22/86 Tr. 20).

Respondent and Norian arrived in Honolulu at about 6:30 p.m. on July 25. Respondent was wearing the same black jumpsuit and gold jewelry that he wore when the trip began. Once again, he and Norian had checked no luggage but were carrying four bags. Upon deplaning in Honolulu, they walked directly to a street level taxi stand. The narcotics officers who had been watching respondent decided to approach him to examine his identification and airline tickets. App. 3a, 57a; 10/29/84 Tr. 11; 9/22/86 Tr. 19; McCarthy Aff. 1.

At 6:41 p.m., while respondent was waiting for a cab, Drug Enforcement Administration (DEA) Agent Richard Kempshall displayed his credentials, took respondent by the arm, and guided him back onto the sidewalk. App. 47a, 57a; 10/29/84 Tr. 14-16.[4] Agent Kempshall asked

[3] After respondent's arrest, the agents learned that "Karl Herman" was respondent's roommate. App. 2a-3a; 10/29/84 Tr. 3, 10; 9/22/86 Tr. 23-25.

[4] Although the agents denied that they had any physical contact with respondent at that time, the district court, observing that the government has the burden of proof on the issue, found respondent's account of the event, in which he claimed that one of the agents grabbed his arm and guided him back to the sidewalk "reasonably believable" (App. 47a; see 10/29/84 Tr. 14-16).

respondent for his ticket and some identification; respondent replied that he had neither. Respondent told the agents that his name was "Sokolow" but that he was traveling under his mother's maiden name, "Kray." He also claimed that a man named "Marty," whom he had met on the beach, had purchased the tickets for him. App. 3a, 57a; 10/29/84 Tr. 14-16; 9/22/86 Tr. 38-40, 44; McCarthy Aff. 1.

Agent Kempshall then told respondent that his luggage would be examined by a narcotics detection dog, and respondent carried his bags to the airport customs area. At 6:54—less than 15 minutes after the agents had approached respondent—the dog alerted to respondent's brown shoulder bag.[5] The agents then arrested respondent, moved him to the DEA airport office, and sought a warrant authorizing a search of the shoulder bag. In the meantime, a woman with an extensive record of narcotics and prostitution arrests was brought into the office on an unrelated matter. She identified respondent as a person she knew as "Andrew" who had purchased two or three "papers" of heroin a day over the past two years from her supplier. App. 4a, 57a-58a; 10/29/84 Tr. 16-21; 9/22/86 Tr. 51-59, 76; McCarthy Aff. 1.

After the warrant issued, the agents searched the brown shoulder bag but found no narcotics.[6] The agents found some incriminating documents, however,[7] and they had

[5] The dog had correctly identified the presence of controlled substances on hundreds of prior occasions (McCarthy Aff. 1).

[6] Cocaine residue was later found in that bag (9/22/86 Tr. 62, 64).

[7] The agents found airline tickets in the names of Andrew Kray and James Wodehouse for two round trips from Honolulu to Miami, as well as Miami hotel receipts for those trips. The agents also found

the narcotics detection dog re-examine the remaining three bags. That time, the dog alerted to a medium-sized carry-on bag. Because it was then 9:30 p.m., the agents told respondent that they could not obtain a search warrant for the bag until the following morning. They permitted respondent to leave but kept his luggage. At 7:45 a.m. the next day, a second narcotics detection dog also examined the carry-on bag, and that dog also detected narcotics. The agents obtained a warrant to search the bag and found 1,000 grams of cocaine inside it. App. 4a, 58a-59a; 9/22/86 Tr. 62-64, 88-89.

2. Respondent moved to suppress the cocaine. Following an evidentiary hearing, a magistrate recommended that the motion be denied. The magistrate found that the agents had a reasonable suspicion that respondent was involved in drug trafficking when they approached him at the curb outside the airport (App. 56a-62a). The magistrate also found that, once the narcotics detection dog discovered narcotics in respondent's luggage, the arrest of respondent and the ensuing seizure and searches of his luggage were supported by probable cause (*id.* at 60a-61a). The district court agreed with the magistrate and denied respondent's suppression motion (*id.* at 52a-55a).

3. The court of appeals reversed by a divided vote (App. 34a-46a).[8] The court held that respondent was

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handwritten notes that appeared to be records of drug transactions. In respondent's personal address book, the agents found the names and addresses of several individuals who were suspected of drug trafficking. Finally, the agents found the keys to four safety deposit boxes. McCarthy Affs. 2, 3.

[8] Before issuing its decision, the court of appeals remanded the case to the district court and directed the court to make supplemental findings on several specified questions (App. 50a-51a). Following a further evidentiary hearing on remand, the district court reaffirmed the denial of respondent's suppression motion (*id.* at 47a-49a). The district court found that respondent had been detained at the curb (*id.* at 47a), but that the detention was supported by a reasonable suspicion that respondent possessed narcotics (*id.* at 47a-48a).

seized at the curb outside the airport and that the seizure was not supported by a reasonable suspicion (*id.* at 39a-44a). In concluding that the seizure was unlawful, the court separately examined each fact known to the agents who stopped respondent and concluded that none of them amounted to a reasonable suspicion that respondent was involved in narcotics trafficking.

The court found that only one fact gave any support to the agents' suspicion – respondent's purchase of the tickets with a large wad of cash. The court acknowledged that that fact, standing alone, was "close" to "particularized evidence of suspicious activity" (App. 42a). Nonetheless, the court concluded that respondent's $2100 cash purchase of airline tickets was not sufficient, standing alone, to justify stopping respondent, because it did not indicate that he was engaged in criminal activity at that moment (*id.* at 43a). The court therefore held that respondent's detention was illegal and ordered the evidence suppressed.

Judge Wiggins dissented (App. 44a-46a). He found that respondent's $2100 cash purchase of airline tickets "is sufficiently suspicious that the addition of [a] few other relatively anomalous characteristics could support a founded suspicion of illegal activity" (*id.* at 45a). He disagreed with the majority's contention that the cash payment was not evidence of " 'ongoing' criminal activity," since large amounts of cash are often used "to conceal illicit travel patterns, or to buy drugs" (*ibid.*). When respondent's cash purchase was added to the brevity of the trip, Miami's reputation as a known source city for drugs, and the lack of checked luggage, Judge Wiggins concluded that the agents had a reasonable suspicion that respondent was engaged in criminal activity (*id.* at 45a-46a). Judge

Wiggins criticized the majority for looking at "each evidentiary factor discretely." As he put it, the majority should have viewed "the whole mosiac rather than each tile" (*id.* at 46a).

4. On rehearing the government argued that, under *United States* v. *Cortez*, 449 U.S. 411 (1981), the majority had erred by examining each fact known to the agents in isolation rather than by examining "the totality of the circumstances—the whole picture" (*id.* at 417).

The court of appeals filed a new opinion taking a different approach, but again set aside respondent's conviction on the ground that the stop was not supported by a reasonable suspicion that respondent was engaged in criminal conduct (App. 1a-21a). The court concluded that the facts in this case described "not ongoing criminal activity but a class of people that is predominantly criminal" (*id.* at 10a). It concluded that the government had "unwittingly equate[d] evidence of *behavior that a criminal may engage in* with *behavior indicating an ongoing crime*" (*id.* at 8a (emphasis in original)).

The court of appeals segregated the facts that bear on the reasonable suspicion inquiry into two categories: facts describing ongoing criminal activity, and facts describing personal characteristics shared by drug couriers. In the first category, the court placed factors such as a person's use of an alias or his evasive movement through an airport; at least one such factor, the court held, must be present to justify a finding of reasonable suspicion (App. 11a-12a). In the second category, the court placed factors such as cash payment for tickets, a quick trip to and from a major source city, nervousness, manner of attire, and the absence of checked luggage. Those factors, the court held, are merely characteristics shared by drug couriers in general and are not evidence of ongoing criminal conduct (*id.* at 12a). Those factors are relevant, the court held, only

if at least one factor from the first category is present (*id.* at 14a, 19a). Even then, the court further held, agents may rely on factors in the second category only if they can demonstrate with "[e]mpirical documentation" (*id.* at 13a) or "statistical evidence" (*id.* at 14a) that the factor in question does not describe the behavior of "significant numbers of innocent persons" (*id.* at 13a; see also *id.* at 12a).

The court then applied its two-part test to the facts in this case (App. 18a-20a). It found no evidence that respondent had used an alias, despite the discrepancy between the name he gave the airline ticket agent when purchasing the tickets and the name under which his telephone number was listed, since "it is not unusual for persons with different last names to share a common residence and telephone" (*id.* at 18a). The court also discounted respondent's nervousness while waiting for a connecting flight at the Los Angeles airport, because "[t]here is no evidence on the record to indicate that [respondent's] nervousness was indicative of an attempt to evade detection" (*id.* at 19a-20a). In the court's view, "[n]ervousness would appear to be a normal human reaction to air travel today, with the seemingly growing risk of mid-air collision and the near certainty of delays that may interrrupt the plans of travelers" (*id.* at 20a). Having discounted the evidence that respondent was traveling under an alias and that he seemed to be nervous, the court rejected as "unsubstantiated" the government's contention that the combination of all the facts in this case "will rarely, if ever, describe an innocent traveler" (*ibid.*).

Judge Wiggins again dissented (App. 21a-33a). He noted that the detention of respondent "was brief, served the important law enforcement purpose of detecting drug couriers, and lasted no more than necessary to effectuate this purpose" (*id.* at 22a). He stated that in his view the

majority's approach was "overly mechanistic" and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts" (*id.* at 25a; emphasis in original). Judge Wiggins explained that, "[i]n evaluating the whole picture, a trained officer may draw inferences and make deductions that would escape an untrained observer. Conduct seemingly innocent may, viewed as a whole, appear suspect to one familiar with the practices of drug smugglers and the methods used to avoid detection" (*id.* at 24a). The majority's approach, Judge Wiggins warned, "effectively throttles the efforts of drug enforcement agents to combat escalating narcotics trafficking" (*id.* at 33a) and would render invalid "many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics" (*id.* at 21a).

In Judge Wiggins' view, the facts known to the agents were sufficient to establish a reasonable suspicion (App. 28a-29a). He placed particular emphasis on respondent's $2100 cash purchase of airline tickets, because "[i]nnocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons" (*id.* at 28a). Such a large cash payment is inconsistent with a legitimate business trip, he found, since it does not provide a paper trail for reimbursement or tax deductions (*ibid.*). Judge Wiggins also noted that the brevity of the trip and the lack of checked luggage were inconsistent with a pleasure trip (*id.* at 28a-29a). Finally, Judge Wiggins remarked that respondent's nervous and watchful behavior during the stopover on his return trip is "hardly a sign of an innocent traveler" (*id.* at 29a).

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided a question of great importance to the national effort to halt the transportation of narcotics within this country and from

abroad. Since 1974, the Drug Enforcement Administration has operated a drug courier surveillance program at numerous airports throughout the nation in order to identify and intercept drug traffickers. That program is an important part of the DEA's drug enforcement efforts, because it provides the DEA with the opportunity to intercept narcotics at a point in the distribution chain above the level that can be reached by more traditional undercover operations. Many of the factors present in this case, but discarded by the court of appeals, are ones on which narcotics agents routinely rely when intercepting drug couriers. Accordingly, if the two-part formula adopted by the court of appeals is allowed to stand, the decision in this case will outlaw a large percentage of the "reasonable suspicion" stops of suspected drug traffickers passing through airports within the Ninth Circuit.[9]

1. When the agents stopped respondent as he was leaving the Honolulu airport on July 25, 1984, they knew the following: (1) respondent had left Honolulu three days earlier on a flight to Miami; (2) at the time, he was dressed in a black jumpsuit and was wearing a large amount of gold jewelry; (3) he paid $2100 for two round-trip tickets between Honolulu and Miami; (4) the tickets were for a flight leaving that day, and they carried an open return; (5) respondent paid for the tickets in cash, from a roll of $20 bills that appeared to contain about $4000; (6) he was traveling under a name that did not match the name in which his telephone was listed, even though his voice was on the answering machine that responded at that number; (7) he was nervous when he was buying the tickets; (8) neither he nor his companion checked any luggage although they were carrying four bags with them; (9) re-

[9] Six of the DEA's 28 airport drug courier surveillance programs are located in cities within the jurisdiction of the Ninth Circuit.

spondent's destination, Miami, is the main source city for cocaine in the United States; (10) respondent stayed in Miami only about 48 hours, even though the travel time between Honolulu and Miami is 10 hours each way; (11) he returned to Miami by an indirect route that included two stopovers; (12) he appeared nervous and watchful while awaiting his connecting flight in the Los Angeles airport; (13) he and his companion also checked no luggage on their return flight from Miami; and (14) respondent was still wearing the black jumpsuit and gold jewelry when he arrived in Honolulu.

The court of appeals found that evidence insufficient to constitute reasonable suspicion and to justify a brief investigative stop of respondent, even though the evidence was stronger than the evidence in all four of this Court's previous airport stop cases. See *Florida* v. *Rodriguez*, 469 U.S. 1 (1984); *Florida* v. *Royer*, 460 U.S. 491 (1983); *Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Mendenhall*, 446 U.S. 544 (1980). In *Florida* v. *Royer*, for example, eight Members of the Court agreed that the evidence available to the officers was sufficient to establish reasonable suspicion, even though the agents had less evidence than the agents had in this case. See 460 U.S. at 502 (opinion of White, J.); *id.* at 515-516 (Blackmun, J., dissenting); *id.* at 523-524 (Rehnquist, J., dissenting). In *Royer*, the officers learned that Royer was traveling under an alias, that he had paid cash for his ticket, that he had put only a name and not an address on his checked luggage, that he was young and casually dressed, and that he seemed nervous while walking through the Miami airport. In this case, as in *Royer*, the agents had a strong indication that respondent was traveling under an alias, and they knew that he had made a huge cash payment for his ticket, that he was traveling to Miami, that he was young and casually dressed, and that he was nervous in both the

Honolulu and Los Angeles airports. In addition, respondent had not checked any bags at all; his itinerary was bizarre, to say the least; and his pattern of travel suggested neither a business trip nor a vacation.

The factors relied upon by the agents in this case—and discounted by the court of appeals—are factors commonly relied on by other courts of appeals in upholding reasonable suspicion stops. See 3 W. LaFave, *Search and Seizure* § 9.3(c), at 446-447 (2d ed. 1987). Purchasing $2100 worth of airline tickets with a roll of $20 bills is highly unusual. It suggests that an individual wants to avoid leaving a trail of receipts behind him, which in turn suggests that he is not on a legitimate business trip.[10] The agents had reason to believe that respondent was using an alias, which is common among drug couriers.[11] Respondent's destination—Miami—was clearly an important factor because, as Agent Kempshall testified (9/22/86 Tr. 66), Miami is the "granddaddy" source city for cocaine.[12] The brevity of respondent's trip to Miami is also consistent with drug trafficking. Respondent spent 20 hours in transit and only 48 hours at his destination, which makes it un-

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[10] The cash purchase of airline tickets is commonly cited to support a finding of reasonable suspicion. See, *e.g.*, *United States* v. *Espinosa-Guerra*, 805 F.2d 1502, 1508 (11th Cir. 1986); *United States* v. *Hanson*, 801 F.2d 757, 761-763 (5th Cir. 1986); *United States* v. *Williams*, 726 F.2d 661, 663 (10th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Jodoin*, 672 F.2d 232, 234 (1st Cir. 1982).

[11] See, *e.g.*, *United States* v. *Espinosa-Guerra*, *supra*; *United States* v. *Hanson*, *supra*; *United States* v. *Palen*, 793 F.2d 853, 857 (7th Cir. 1986); *United States* v. *Puglisi*, 723 F.2d 779, 789 (11th Cir. 1984); *United States* v. *Ehlebracht*, 693 F.2d 333, 336 (5th Cir. Unit B 1982); *United States* v. *Jodoin*, 672 F.2d at 233.

[12] See, *e.g.*, *United States* v. *Haye*, 825 F.2d 32, 34 (4th Cir. 1987) (Miami is a "known source[] of drug supplies"); *United States* v. *Espinosa-Guerra*, 805 F.2d at 1508; *United States* v. *Puglisi*, 723 F.2d at 789.

likely that he went to Miami for a vacation.[13] Respondent checked no luggage, even though he and his companion had four bags with them, which is consistent with the modus operandi of a drug courier, since it allows him to exit the airport terminal quickly.[14] Finally, respondent was nervous when he purchased his tickets, and he nervously scanned the waiting area at the Los Angeles airport while he was en route to Hawaii. Nervousness may be a characteristic shared by many criminals, but it is particularly relevant in the investigation of drug couriers because of their heightened concern about apprehension while they are passing though airports in possession of large amounts of narcotics or cash.[15]

2. In addition to being contrary to prior airport stop cases from this Court and other courts of appeals, the analysis by the court of appeals in this case is contrary to several of the general principles that this Court has set forth in analyzing the Fourth Amendment principles that apply to investigative stops. Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), it has been clear that a law enforcement officer may briefly stop and detain a person for investigative purposes when the officer can point to specific facts that reasonably indicate that the person detained may be in-

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[13] See *United States* v. *Hanson, supra; United States* v. *Palen*, 793 F.2d at 857 (five-day stay in Florida is "a relatively short period of time * * * for a tourist from Alaska"); *United States* v. *Ehlebracht*, 693 F.2d at 336.

[14] See *United States* v. *Espinosa-Guerra, supra.*

[15] Numerous courts have treated nervousness as an important factor in determining the existence of reasonable suspicion. See, *e.g.*, *United States* v. *Borys*, 766 F.2d 304, 311-312 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986); *United States* v. *Williams*, 754 F.2d 672, 674 (6th Cir. 1985); *United States* v. *Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), cert. denied, 464 U.S. 933 (1983); *United States* v. *Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982).

volved in criminal activity, even though the facts known to the officer do not constitute probable cause to believe that the suspect has committed a crime.

Terry and its successors have established three important principles for "reasonable suspicion" cases. *First*, in order to justify stopping a suspect for questioning, a law enforcement officer is not required to eliminate all innocent explanations for the suspect's behavior, or even to determine that the suspect's actions are more likely to be culpable than innocent. Rather, the officer may act when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" (*Terry*, 392 U.S. at 30). That standard demands only "some minimum level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984).[16] *Second*, in determining whether a set of factors gives rise to reasonable suspicion, it is wrong to consider each factor in isolation and to judge whether, standing alone, it supports a reasonable suspicion. "[T]he essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account" when determining if there is a reasonable suspicion that a person is connected with criminal activity. *United States* v. *Cortez*, 449 U.S. 411,

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[16] See *United States* v. *Montoya De Hernandez*, 473 U.S. 531, 541 (1985); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); cf. *United States* v. *Ramsey*, 431 U.S. 606, 612-613 (1977) ("reasonable cause" standard of 19 U.S.C. 482 authorizing customs officers to search imported merchandise is less than probable cause); see generally 3 W. LaFave, *supra*, § 9.3(b), at 431 ("it would seem clear [from *Terry*] that a more-probable-than-not standard is never applicable to a brief stopping for investigation"); *id.* at 432 & n.58 (collecting cases in which courts "quite properly" upheld a *Terry* stop even though the actions observed were consistent with innocent activity).

417 (1981). See also *Terry*, 392 U.S. at 22 ("a series of acts, each of them perhaps innocent in itself * * * taken together [may] warrant[] further investigation"). *Third*, the evidence known to an officer must be viewed, "fact on fact and clue on clue," in light of the inferences and deductions that a trained and experienced officer would reach, "inferences and deductions that might well elude an untrained person." *Cortez*, 449 U.S. at 418, 419.[17]

Rather than simply applying those principles, the court of appeals devised a novel two-part test to be used in assessing reasonable suspicion stops in the airport setting. The effect of that test, however, was to obscure the probative force of the evidence in this case—evidence which, when viewed in a commonsense fashion, amply justified the agents' suspicions that respondent's curious three-day journey between Honolulu and Miami had a criminal purpose.[18]

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[17] See also *United States* v. *Mendenhall*, 446 U.S. 544, 563-564 (1980) (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979) (a trained, experienced officer "is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."); *Terry*, 392 U.S. at 27 ("due weight must be given * * * to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

[18] The two-part test devised by the court of appeals recalls the two-part test that this Court formerly applied in making probable cause determinations. See *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964). In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the Court rejected that two-part test in favor of a "totality of the circumstances" approach to probable cause. The Court did so because the *Aguilar-Spinelli* test did not permit "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability)" and "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that simply cannot sensibly be divorced from the other facts presented to the magistrate." *Id.* at 234-235 (footnote omitted). The two-part test adopted by the court of appeals is subject to precisely the same criticism: it impedes, rather than assists, clarity of analysis of the strength of the evidence adduced in support of the agents' actions.

The court of appeals first divided the factors bearing on reasonable suspicion into two categories: those that indicate ongoing criminal activity, and those that merely reflect conduct that criminals engage in. The court then held that factors from the second category could not justify a finding of reasonable suspicion absent some factor from the first category, and that in order to rely on factors from the second category, the government would have to introduce empirical or statistical evidence establishing that those factors serve to identify criminals, rather than a large number of innocent persons.

The court of appeals' test treats the factors bearing on reasonable suspicion precisely the way *Terry* said they should not be treated. It creates a false dichotomy between direct evidence, which the court of appeals termed evidence indicative of criminal activity, and circumstantial evidence, which the court of appeals termed evidence indicative of criminal character. Factors that indicate that a person is a drug smuggler do so precisely because they tend, to a greater or lesser degree, to be associated with the act of drug smuggling. Thus, the factors bearing on the issue of reasonable suspicion cannot be neatly lumped into one of two categories, as the court of appeals has done in this case.

To divide the factors typically relied on by police into the two categories invented by the court of appeals has the effect of improperly denigrating certain factors. For example, it assigns too little weight to a suspect's nervousness, which the court of appeals placed in the cate-

gory describing criminal character rather than describing ongoing criminal activity. While nervousness in an airport may be exhibited by both drug couriers and innocent persons, it is logically consistent with ongoing criminal activity and is an important factor in an agent's assessment whether an individual is likely to be carrying drugs at a particular time. See, *e.g.*, *Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.); 3 W. LaFave, *supra*, § 9.3(c), at 447. Nervousness is a natural reaction of a courier who is transporting drugs or cash and is looking around the airport for agents who may be conducting surveillance. For a courier, carrying narcotics through an airport is apt to provoke extraordinarily high anxiety, which is likely to manifest itself in demonstrable, albeit subtle, ways.[19]

The court's relegation of the nervousness factor to the second category also disregards the differences among types of nervousness. A person may be ill-at-ease or anxious in an airport without giving rise to suspicion that he is engaged in unlawful activity. On the other hand, when a person is nervous and watchful, as was petitioner during his layover in Los Angeles, his nervousness takes on more significance. It defies common sense to suppose that officers who have spent months or years observing thousands of travelers passing through airports cannot distinguish between the type of nervousness shown by persons who fear apprehension for criminal activity and the

[19] Curiously, the court of appeals in its first opinion – before it had focused on the fact that there was evidence of nervousness in this case – put the nervousness factor in the first category, not the second. See App. 43a (emphasis in original) ("Sokolow's payment in cash is quite unlike a suspect's looking around to see if he was being watched, appearing nervous, taking evasive action, or using an alias while traveling, all of which at least tend to raise a suspicion that criminal activity is going on *at that time*.").

type of nervousness shown by persons who fear air travel. Thus, it is both unrealistic and unresponsive to subtle differences in human behavior simply to lump nervousness as a whole into the category of conduct that does not suggest ongoing criminal activity.

Similarly, the cash purchase of tickets is not simply a characteristic typical of many criminals, as the court of appeals seemed to believe. Instead, it has a logical bearing on the likelihood that the individual is engaged in criminal conduct at the time. Unlike the use of a credit card or a check, the cash purchase of a ticket enables the individual to travel under an alias without disclosing his true identity, and it leaves no paper trail that can tie the traveler to a particular trip.[20]

Not checking luggage is also a technique that is often used to minimize the risk of apprehension in airports, because it enables the couriers to exit the terminal quickly, thereby miminizing the opportunity for airport narcotics agents to observe them. Again, that factor is more likely to be present when the suspect is engaged in criminal activity, and less likely when he is merely taking an innocent trip.

By relegating to second-class status factors such as nervousness, the cash purchase of tickets, and the failure to check baggage, and by requiring empirical proof of the significance of those factors, the court of appeals violated all three of the principles from *Terry* that are set forth above. Requiring empirical proof that particular factors are not associated with large numbers of innocent travelers

[20] Again, the contrast between the court of appeals' first opinion and its second is striking. In the first opinion, the court regarded the cash purchase of tickets as being "close," standing alone, to establishing reasonable suspicion (App. 42a). In the second opinion, however, the cash purchase of tickets had tumbled into the second category of factors and was not considered relevant at all.

ignores the principle from *Terry* that reasonable suspicion does not require the same level of confidence that is required for proof at trial or for a showing of probable cause, but only an articulable basis for believing that criminal activity "may be afoot." It also ignores the principle that the evidence must be considered as a whole and the principle that it must be viewed in the light of inferences that can be drawn by trained law enforcement officers.

Any number of factors, standing, alone, may describe large numbers of innocent travelers as well as a large percentage of drug couriers. For example, wearing casual dress, being young, and not checking baggage certainly describes many travelers, and for that reason one or all of those factors would not be enough, standing alone, to justify an investigative stop. But those factors, in a particular context and in conjunction with other factors, can properly lead trained officers observing the suspect to conclude that there is enough evidence to distinguish that person from the ordinary traveling public to justify a brief detention and inquiry.

Common sense, not statistics, has always been the cornerstone of the Fourth Amendment. The Court has made clear that whether the facts known to a narcotics officer constitute a reasonable suspicion must be determined by the officer's "*common-sense* conclusion about human behavior." *Cortez*, 449 U.S. at 418 (emphasis added). The evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.* See also *United States* v. *Montoya De Hernandez*, 473 U.S. 531, 542 (1985); *Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *Terry*, 392

U.S. at 27.[21] By demanding that experienced narcotics agents justify their commonsense inferences with statistical proof, the court of appeals essentially reformulated the reasonable suspicion inquiry as one that must be examined from the viewpoint of an untrained layman, a perspective flatly inconsistent with the one required by this Court's decisions.

The evidence on which narcotics agents rely cannot be disregarded on the ground that it might not arouse suspicion in a layman. This Court has recognized that a trained police officer is a professional observer of criminal activity and may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown* v. *Texas*, 443 U.S. at 52 n.2. That conclusion is hardly surprising. It should be expected that experienced narcotics agents will be able to discern criminal conduct they have been trained to spot. Indeed, it would make little sense to train agents in drug enforcement if they can stop and question a suspect only on grounds that would be equally obvious to any layman.[22]

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[21] Even in connection with probable cause, the Court has made clear that that no "numerically precise degree of certainty" is necessary (*Illinois* v. *Gates*, 462 U.S. 231, 235 (1983)) and that the question whether probable cause exists must be answered on the basis of the "nontechnical, common-sense judgments of laymen applying a standard less demanding that those used in more formal legal proceedings" (*id.* at 235-236).

[22] The narcotics agents involved in this case had extensive experience in apprehending drug couriers. Officer McCarthy had been a police officer for ten years, he had worked with the Drug Enforcement Administration at the Honolulu airport for two years, and he had participated in more than 300 narcotics investigations, two-thirds of which involved cocaine and most of which occurred at the airport. DEA Kempshall had 15 years' experience and had participated in several thousand narcotics investigations, about half of which involved cocaine. He had been patrolling the Honolulu airport for nar-

Nor can the evidence known to the officers be disregarded on the ground that it was subtle. Narcotics smuggling is a crime of stealth. Unlike the crime in *Terry*, which involved the casing of a store for a robbery, respondent's crime required no action other than concealment and escape for its completion. Respondent's goal was to do as little as possible in order to avoid detection. For that reason, it is hardly surprising that respondent did not engage in conduct that would have been highly suspicious to a lay observer. Only by noticing and piecing together subtle clues can a narcotics agent discern whether a person is transporting drugs, as respondent turned out to be.

3. In sum, the court of appeals' decision in this case is contrary to this Court's decision in *Royer*; it is contrary to the approach employed by other courts of appeals in analyzing airport stop cases; and it is contrary to the principles that this Court has established to guide the application of the Fourth Amendment in the context of "reasonable suspicion" stops. This Court should grant review to resolve those conflicts and to avoid the damage that the decision in this case, if uncorrected, would do to the government's airport narcotics detection program in the Ninth Circuit.

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cotics traffickers since 1979, and was conversant with the methods used to transport narcotics as a result of discussions with fellow agents and with drug couriers. 9/22/86 Tr. 4-6, 26-30, 66-69.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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87-1295

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 87-02200-01 SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

SAMUEL P. KING, District Judge, Presiding

Argued and Submitted
July 12, 1985—San Francisco, California
Remanded for Additional Findings, July 31, 1986
Resubmitted, October 31, 1986

Filed January 28, 1987
Amended March 10, 1987
Second Amended Opinion Filed November 4, 1987

SECOND AMENDED OPINION

Before: WARREN J. FERGUSON, WILLIAM A. NORRIS and CHARLES WIGGINS, Circuit Judges.

Opinion by Judge FERGUSON; Dissent by Judge WIGGINS

OPINION

FERGUSON, Circuit Judge:

On appeal from his conviction for possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), Andrew Sokolow challenges the district court's ruling denying his motion to suppress evidence obtained during the retention of himself and his luggage at the Honolulu airport. The evidence he moved to suppress included 1,000 grams of cocaine. Exercising appellate jurisdiction under 28 U.S.C. § 1291, we initially reversed his conviction on the ground that agents of the Drug Enforcement Agency had violated the Fourth Amendment in detaining Sokolow and searching his luggage. 808 F.2d 1366 (9th Cir. 1987). On petition for rehearing, the government draws our attention to additional evidence that it believes should change our original conclusion that the Fourth Amendment had been violated. We disagree, and thus deny the government's petition for rehearing, vacate our previous disposition, and file this amended opinion.

I.

On Sunday, July 22, 1984, Sokolow purchased two round-trip tickets to Miami at the United Airlines counter at Honolulu Airport. Sokolow paid for the $2100 tickets in cash with approximately half of a large wad of $20 bills he was carrying, purchasing them under the names of Andrew Kray and Janet Norian. The ticket agent notified drug task force agent John McCarthy of the purchase. Agent McCarthy called the telephone number given to the ticket agent by Sokolow. The call was answered by a recorded message on an answering machine. Upon listening to a tape of this message, the ticket agent identified the voice as that of Sokolow. Agent McCarthy determined that the number was subscribed to by Karl Herman at

348-A Royal Hawaiian Avenue, Honolulu, Hawaii. What Agent McCarthy apparently did not know at this time was that both Herman and Sokolow lived at this address. On July 24, Agent McCarthy learned that Sokolow and Janet Norian were scheduled to return to Honolulu the following day on a flight with a layover in Los Angeles. On July 25, agents at the Los Angeles airport reported that during his layover Sokolow "appeared to be very nervous and was looking all around the waiting area"[1] and that Sokolow and Norian had boarded the flight to Honolulu. Sokolow was wearing a black jumpsuit and a large amount of gold jewelry.

Traveling with carry-on luggage only, Sokolow and Norian arrived at Honolulu airport and proceeded directly to the street to hail a taxi. They were at curbside waiting for a taxi when, at approximately 6:41 p.m., several Drug Enforcement Administration (DEA) agents approached them. As found by the district court, the agents grabbed Sokolow by the arm, pulled him onto the walkway, and sat him down. Agent Kempshall then asked Sokolow for his airline ticket and identification. Sokolow responded that he was not carrying any identification and did not have his airline ticket. Sokolow further stated that, although his name was Sokolow, he was using his mother's maiden name Kray, and that he had not made the reservations himself. Sokolow, Norian, and their luggage were then taken to a DEA office in the airport.

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[1] Transcript of Remand Hearing of September 22, 1986, at 20, 36, 67. The testimony that the Los Angeles agents made this report to the Honolulu agents was adduced during an evidentiary hearing conducted by the district judge in response to our limited remand for additional findings of fact on specified issues. The district judge's supplemental findings of fact and conclusions of law were forwarded to this court, but the reporter's transcript of the evidentiary hearing was not made part of the appellate record until the government filed its petition for rehearing.

In the DEA office, the luggage was turned over to a Customs Service dog handler for examination by a narcotics detector dog. The narcotics detection dog alerted to a brown shoulder bag. Based on this information, the agents placed Sokolow under arrest and proceeded to secure a warrant to search the shoulder bag. Although the search uncovered no drugs, it did uncover certain papers that prompted the agents to have the narcotics detection dog reexamine the remaining three pieces of luggage. This time the dog alerted to a medium-sized carry-on bag. Ultimately, another narcotics detection dog confirmed this alert. The agents searched the medium-sized bag pursuant to a warrant and found 1,000 grams of cocaine. Sokolow was indicted for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). The district court denied his motion to suppress all statements and evidence secured pursuant to his seizure, his arrest, and the search of his luggage. Sokolow entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2), thereby preserving his right to challenge the district judge's ruling on his Fourth Amendment claims. Concluding that reversal was a possibility because the case was a "close one," the district court granted Sokolow bail pending appeal.

II.

A.

Resolution of the Fourth Amendment issues presented by this appeal requires a close analysis of the DEA agents' actions in detaining Sokolow and detaining and searching his luggage. We begin with the initial contact between the agents the Sokolow at curbside. Without making any specific findings of fact, the district court originally ruled that the initial contact between the agents and Sokolow at curbside did not rise to the level of a seizure, citing *Florida v. Royer*, 460 U.S. 491 (1983), for the proposition that "[t]here is no Constitutional infringement when an officer

merely approaches and speaks to an individual in a public place." *Id.* at 497. However, this ruling has since been cast into considerable doubt by the district court's findings on remand,[2] which belie the apparent assumption that this case involved nothing more than agents who approached and spoke to a suspect in a consensual manner. On remand, the district court accepted Sokolow's contention that the agents grabbed him by the arm and moved him back to a seat before they asked him questions. Although the "federal agents do not remember the event in the same way," the district court found that the government had not met its burden of proof on the issue.

We review de novo the question whether a seizure occurred. *See LaDuke v. Nelson*, 762 F.2d 1318, 1327 (9th Cir. 1985). Although we certainly have no quarrel with the proposition that police do not seize a person within the meaning of the Fourth Amendment by merely approaching him and asking him questions in public, we think it clear that the initial curbside contact in this case did not involve such a consensual encounter. Physically grabbing, moving, and seating a suspect to ask questions, even in public, clearly restrains that suspect's liberty in a nonvoluntary way. Indeed, the use of physical means to restrain a person's movement is the most obvious form of seizure. *See e.g., Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J.): *United States v. Patino*, 649 F.2d 724, 728 (9th Cir. 1981) (stating that physical restraint is the "most obvious" form of seizure). Thus, we hold that Sokolow was seized at the point he was grabbed and seated, and before any questioning occurred.

Although not all seizures require probable cause, "any curtailment of a person's liberty by the police must be sup-

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[2] After argument, we vacated submission and remanded to the district court for additional findings of fact on specific issues.

ported by a least a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam). We review the district court's conclusion that a reasonable suspicion existed de novo.[3] *United States v. Sutton*, 794 F.2d 1415, 1425 (9th Cir. 1986); *United States v. Maybusher*, 735 F.2d 366, 371 & n.1 (9th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985). We conclude that no reasonable and articulable suspicion existed at the time the agents grabbed Sokolow by the arm and sat him down.

The agents knew the following facts matching their "drug courier profile" when they first approached Sokolow:[4] (1) that Sokolow had just returned from a three-day trip to Miami, a well-known source city for drugs; (2) that Sokolow had paid for his tickets out of a large wad of $20 bills; (3) that neither Sokolow nor Norian checked any luggage; (4) that during Sokolow's layover in Los Angeles he "appeared to be very nervous and was looking all around the waiting area",[5] (5) that Sokolow

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[3] We accept as not clearly erroneous the findings of fact upon which the district court based its conclusion that reasonable suspicion existed.

[4] The district court based its conclusion that the initial curbside stop was supported by a founded suspicion in part on the facts that Sokolow admitted he was not traveling under his real name and that he told the agents he did not have his ticket even though he had just gotten off the plane. We disagree. The initial seizure, which we hold occurred when the agents first grabbed Sokolow, must be based upon a reasonable and articulable suspicion that existed at that time. It cannot be based on information that is a fruit of the seizure itself. *See United States v. Erwin*, 803 F.2d 1505, 1510 n.2 (9th Cir. 1986).

[5] In our original opinion, we held that a report that simply characterized Sokolow's behavior during his layover in Los Angeles as "suspicious" was too conclusory to constitute *articulable* information supporting a "reasonable suspicion absent any description of that "suspicious" behavior. 808 F.2d at 1370 n.6. However, in its petition

dressed in a black jumpsuit and wore a lot of gold jewelry; and (6) that Sokolow had his voice on an answering machine at a phone subscribed to by Karl Herman but was ticketed under the name Andrew Kray. The agents did not know at the time of seizure that the defendant's true name was Sokolow. With these facts in mind, we begin our analysis.

III.

In *Terry v. Ohio*, 392 U.S. 1 (1967), the Supreme Court announced that brief stop and frisk detentions fell within the Fourth Amendment's protection against unreasonable searches and seizures. Since *Terry*, the courts have been left to explore "the limitations which the Fourth Amendment places upon a protective seizure and search for weapons" and to examine the broader limits of *Terry* as applied to situations beyond a police officer's need for self-protection. The increasing breadth of *Terry* issues[6] and the increasing difficulty of the courts in defining the

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for rehearing, the government for the first time called our attention to testimony at the remand hearing that describes Sokolow's behavior in Los Angeles in greater detail. *See* Gov't Pet. Reh'g at 7 & n.3, 13-14. The record now before us thus includes a report that Sokolow "appeared to be very nervous and was looking all around the waiting area" during his layover in Los Angeles. Tr at 20, 36, 67. This report is articulated sufficiently to be considered as a basis for reasonable suspicion.

[6] The range of issues addressed by the Supreme Court via a *Terry*-type analysis has broadened greatly. *See, e.g. United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (border search); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of high school student by school officials); *Michigan v. Long*, 463 U.S. 1032 (1983) (search of car interior for weapons incident to an investigative stop); *United States v. Place*, 462 U.S. 696 (1983) (*Terry* stop of luggage in airport); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention of person incident to the execution of a search warrant); *United States v. Cortez*, 449 U.S. 411 (1981) (investigative stop of truck near border); *United*

limits of *Terry* stops "in the concrete factual circumstances of individual cases", 392 U.S. at 29,[7] demand that we pay heed to Justice Douglas's warning in dissent to *Terry* against the "powerful hydraulic pressures throughout our history that bear heavily . . . to water down constitutional guarantees and give the police the upper hand." 392 U.S. at 39 (Douglas, J., dissenting). Believing that the government's position in its petition for rehearing unwittingly equates evidence of *behavior that a criminal may engage in* with *behavior indicating an ongoing crime*, and thus significantly dilutes our constitutional guarantees, we reaffirm our original conclusion that the Fourth Amendment was violated.

In assessing whether a given set of facts constitutes reasonable suspicion, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. "[T]he totality of the circumstances—the whole picture—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *see also United States v. Ramirez-Cifuentes*, 682 F.2d 337, 342 (9th Cir. 1982).

Although the government may present a lengthy list of detailed observations, the courts are not relieved of their duty to review the list critically and decide whether each

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States v. Brignoni-Ponce, 422 U.S. 873 (1975) (temporary seizure to investigate potential violation of immigration laws); *Adams v. Williams*, 407 U.S. 143 (1972) (investigative stop based upon informant's tip).

[7] *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 560 (1980) (Powell, J., concurring) (finding that "the question of whether the [defendant] could reasonably have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close"); *United States v. Erwin*, 803 F.2d 1505, 1513 (Wiggins, J., dissenting) (noting that the courts "walk a fine line between rewarding good police judgment and authorizing arbitrary government action").

particular observation cited actually contributes something to the "whole picture"—that is, whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity. *See Erwin*, 803 F.2d at 1510 n.2 (refusing to consider facts "bear[ing] no reasonable relationship to the question of whether [the suspect] was then engaged in the unlawful transportation of narcotics."). Courts are not obliged to accept blindly any fact the police can muster when the government fails to establish any credible connection between that fact and a suspicion of ongoing (or recently completed) criminal activity. Nor is the phrase "drug courier profile" a talismanic label that the government can apply to any given set of facts to obviate consideration of whether reasonable suspicion existed. Indeed, it is obvious that the "drug-courier profile" often has a chameleon-like way of adapting to any particular set of observations. *Compare, e.g., United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982) (suspect was first to deplane), *with United States v. Mendenhall*, 446 U.S. 544, 564 (1980) (last to deplane), *with United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980) (deplaned from middle); *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980) (one-way tickets), *with United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (round-trip tickets); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (non-stop flight), *with Sokolow*, 808 F.2d at 1370 (changed planes); *Craemer*, 555 F.2d at 595 (no luggage), *with United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. Unit B 1981) (gym bag), *with United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979) (two carry-on and two-checked pieces of luggage); *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978) (traveling alone), *with United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980) (traveling with companion). *See generally*

Becton, *The Drug Courier Profile*, 65 N.C.L. Rev. 417, 438-44, 474-80 (1987).

What, then, may constitute reasonable suspicion to justify a seizure? We reaffirm our earlier conclusion that, even when one looks at the "whole picture," facts that bear some reasonable correlation to a suspicion of ongoing criminal activity but also " 'describe a very large category of presumably innocent travelers' " cannot support a reasonable suspicion by themselves. *See* 808 F.2d at 1371 (quoting *Reid*, 448 U.S. at 441). Rather, such facts must be coupled with evidence about the "particular conduct" of the defendant, *Reid*, 448 U.S. at 441, and the "[p]articularized evidence must raise suspicions of *ongoing* (or recently completed) criminal activity." 808 F.2d at 1371. Simply put, the "whole picture" does not amount to reasonable suspicion unless such particularized evidence exists.

The "mosaic" presented by the government on petition for rehearing, even with the addition of evidence of Sokolow's nervousness in transit, fails to form an image of ongoing criminal activity. Instead, we see a vaguer shape resulting from the improper attempt to define not ongoing criminal activity but a class of people that is predominantly criminal. The Supreme Court, by contrast, requires that the reasonable suspicion supporting an investigative stop be reasonable suspicion of an ongoing crime, and thus forecloses the result requested by the government. We will support our conclusion with an analysis of *Terry* and its application to the use of criminal "profiles." We then discuss the development of *Terry* and its application to the use of criminal "profiles." We then discuss the development of *Terry* principles in profile-stop cases. We finally reaffirm our earlier conclusion that the profile in this case failed to provide reasonable suspicion for a seizure of Sokolow.

A.

Terry concerned a policeman's stop of several persons the officer believed were "casing" a store for a robbery. The Court accepted that the officer had reasonable suspicion for a stop, and proceeded to discuss at greater length the reasonableness of his weapons frisk in light of his concern for his own safety from possible concealed weapons. 392 U.S. at 27-28; *see also id.* at 32-33 (Harlan, J., concurring). The Court concluded that the intrusion on the defendant's Fourth Amendment interests was warranted in light of the officer's need for safety.

The factual basis for the Court's brief conclusion is illustrative. The Court found that the defendants' behavior, when viewed through the trained eye of a police officer, was "consistent with [the officer's] hypothesis that these men were contemplating a daytime robbery." *Id.* at 28. It was not that Terry and his cohorts "looked like" robbers, but instead that their actions betrayed an involvement in a developing crime. This involvement justified the officer's investigative stop of the defendants, and the officer's reasonable concern for safety then warranted the weapons frisk.

The drug-courier profile, if used as a measure of reasonable suspicion, operates in a different manner than did the officer's trained evaluation that warranted the stop in *Terry*. Profile elements include aspects of a suspect's behavior that clearly are consistent with an ongoing crime, such as when a suspect uses an alias in travel or when a suspect takes an evasive or erratic path through an airport in a manner that demonstrates a desire to avoid detection. Traveling under an alias or evasive movements are part of the performance of the crime. These elements of the profile demonstrate behavior that, absent unusual circumstances,[8] reasonably may demonstrate an ongoing

[8] In Judge Wiggins's dissent to *United States v. Erwin*, 803 F.2d 1505 (9th Cir. 1986), he found plausible the defendant's explanation

crime. An officer seeking to justify a seizure based upon these profile characteristics can testify to the suspicious behavior, and if the court finds the testimony credible, the seizure will be justified. The seizure is justified not because a requisite number of profile elements have been satisfied, but because some elements of the profile may create a reasonable suspicion of an ongoing criminal enterprise.

Other elements of the profile, however, seek to identify personal characteristics shared by drug couriers and the public at large, but which, when present in sufficient number, arguably serve to identify drug couriers. Such elements as nervousness, a destination or arrival including a "drug source" or "drug reception" city, manner of attire, time of flight, and position among the disembarking passengers, among myriad others, describe cross-sections of the people who use planes, but without any indication that those cross-sections are predominantly, or even mainly, engaged in an ongoing crime. By themselves, they indicate no ongoing criminal enterprise, but attempt to identify an individual as the type of person who may engage in a criminal enterprise, based upon stereotypes of drug courier appearance or behavior.

An officer attempting to justify a seizure based solely upon these aspects of the profile necessarily must present a different type of testimony than the factors discussed earlier. The officer must demonstrate that the combination of behavior exhibited by the suspect, although not directly probative of ongoing criminal behavior, is unlikely to exist in innocent persons or, perhaps, in some "significant" percentage of innocent persons.

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for actions deemed evasive by the majority. *Compare id.* at 1511 (majority finding roundabout route grounds for suspicion) *with id.* at 1512 (Wiggins, J., dissenting) (finding roundabout route failed to justify suspicion where defendant told agents that route was taken to avoid a picket line at a time when strike was in progress).

Comparative examples may help. An officer in the first type of case will testify that, in accord with the sharpened understanding of his or her profession, a suspect's travel under an alias or meandering path through an airport demonstrate behavior indicative of an ongoing criminal activity. While probable cause for arrest does not yet exist, the most reasonable explanation of such activity may be that a criminal enterprise is in progress.

In this type of case, the traditional focus on criminal activity shifts to a focus on the personal characteristics of the individual under scrutiny. Not only is this transfer of focus impermissible, its accuracy is often uncorroborated. Here, an officer must testify that a pattern of behavior, otherwise explicable as innocent behavior, does not exist in a significant number of innocent people. The officer testifies not about his own trained observation of criminal activity, but instead about the probability that drug couriers generally exhibit certain external characteristics. Unfortunately, the testimony seldom is constructed in that extended a fashion. Empirical documentation would be necessary for the assertion that, for example, the class of nervous, cash-paying travelers to Miami does not include significant numbers of innocent persons. The court is left to evaluate *not* the reasonableness of an officer's assessment of facts demonstrating an ongoing criminal enterprise, but the probabilistic evidence (compiled from cases not before the court) that indicates that "innocent" behavior is not so innocent.

We have already demonstrated, by reference to Judge Brocton's painstaking and insightful examination of the profile, *see supra* pp. 10-11, the unusual vicissitudes that the profile may undergo in the hands of different agents and when justifying different seizures. The very transmutability of the profile demonstrates that it fails to justify a Fourth Amendment seizure. When the focus is away from facts indicating ongoing criminal activity and instead upon innocent behavior in which criminals may

engage, virtually anything may support "reasonable" suspicion.

We do not believe that our conclusion destroys the mosaic by rejecting tile after tile. We merely recognize that the mosaic that may cause a trained officer of the law to investigate further is not the same mosaic that creates reasonable suspicion to allow a Fourth Amendment seizure. Some distinction between investigation and detention must remain.[9] The surmises or hunches that may lead a trained investigator to continue investigation, however, do not serve to allow a seizure.

Our formulation of the reasonable suspicion standard also allows for the continued use of the profile in justifying reasonable suspicion. Accumulating a certain number of positive responses to elements of the profile would not create reasonable suspicion. Profile elements that indicate ongoing criminal behavior, however, may be supplemented by other aspects of the profile that would not by themselves create reasonable suspicion. Hence, a traveler under an alias arriving from Miami may arouse a greater suspicion than a traveler arriving under an alias from Dubuque. All of these supporting factors, however, should be demonstrated by more statistical evidence than "common knowledge."

We thus believe that reasonable suspicion must be founded upon evidence of ongoing criminal behavior. Probabilistic evidence, absent more, is insufficient to create reasonable suspicion. Such evidence, when sufficiently documented, may serve to confirm or deny reasonable suspicion based upon evidence of ongoing

[9] Of course, the officer may approach the suspect prior to "reasonable suspicion," so long as his approach does not constitute a seizure. *See Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); *United States v. Mendenhall*, 446 U.S. 544, 553-55 (1980) (opinion of Stewart, J.). We have already determined, however, that the agents seized Sokolow when they grabbed and forcibly seated him at the airport curb.

criminal behavior. We further believe that this interpretation of reasonable suspicion is not new, but has been announced by the Supreme Court in its examinations of the profile.

B.

We believe that our interpretation of the reasonable suspicion standard is in harmony with the Supreme Court's pronouncements regarding the profile. The Court has consistently looked beyond the profile to determine whether a reasonable suspicion exists of a criminal enterprise. Searches based solely on the personal characteristics of a suspect have been rejected as unreasonable.

The Supreme Court first encountered the profile in *United States v. Mendenhall*, 446 U.S. 544 (1980). In *Mendenhall*, the defendant challenged her conviction on the ground that the evidence against her was obtained via an unconstitutional search and seizure. A majority of the court rejected the defendant's claim, although disagreed as to a rationale. Justice Stewart, joined by Justice Rehnquist, concluded that the stop of Mendenhall was consensual and thus did not amount to a seizure within the meaning of the Fourth Amendment. *Id.* at 553-55 (opinion of Stewart, J.). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found that, assuming that the initial questioning of the defendant was a seizure, the seizure was justified by reasonable suspicion. *Id.* at 560. Justice Powell did not reach the question of the initial seizure since the lower courts had not addressed the issue. *Id.* Four justices dissented.

Although Justice Stewart noted that the initial confrontation was based upon the "so-called 'drug courier profile'—an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs," *id.* at 547 n.1, his opinion did not discuss the profile since he deemed the initial encounter to be consen-

sual. Only Justice Powell's concurrence reached the issue, and his analysis is significant. In recounting the events that created reasonable suspicion, Justice Powell noted that the "respondent, who appeared very nervous, *engaged in behavior that the agents believed was designed to evade detection.*" *Id.* at 564 (opinion of Powell, J.). Although Justice Powell spoke for only three members of the court, his analysis clearly was predicated upon ongoing criminal behavior. The dissent took issue with Justice Powell that the evidence was sufficient to establish reasonable suspicion of ongoing criminal behavior, but all seven justices who reached the issue agreed that the agents must have reasonably suspected that the defendant was "engaged in criminal activity." *Compare id.* (Powell, J., concurring) *with id.* at 571 (White, J., dissenting).

The court again considered the drug-courier profile later in the 1979 Term. In *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam), the Court vacated a decision of the Georgia Court of Appeals. The Georgia court had found reasonable suspicion for a seizure based upon a number of characteristics within the courier profile. In vacating, the Court noted that

> [o]f the evidence relied on, only the fact that petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances [drug source city departure, early-morning arrival, no luggage other than shoulder bags] describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id. at 441. Once again, the court rejected a definition of reasonable suspicion not predicated on ongoing criminal

activity. Particular conduct of an ongoing criminal enterprise is required; evidence regarding the type of person suspected does not suffice.

Florida v. Royer, 460 U.S. 491 (1983), also presented an investigation premised on the "so-called 'drug courier profile.'" *Id.* at 493 (opinion of White, J.). In *Royer*, the defendant contested a search obtained after a stop occasioned by the profile. The plurality, per Justice White, found that the initial stop of Royer was justified by a reasonable suspicion, but that the subsequent movement of Royer to a small room exceeded the permissible level of the investigative stop. *Id.* at 502-05. Both dissenting opinions agreed that the initial stop was justified by a reasonable suspicion. *See id.* at 518 (Blackmun, J., dissenting); *id.* at 523 (Rehnquist, J., dissenting). Thus, all the members of the Court, save Justice Brennan, *see id.* at 509 (Brennan, J., concurring in the result), agreed that a reasonable suspicion existed.

The facts leading upon the detention of Royer are far different than those at hand here, and *Royer* quite simply cannot serve as a simple equation of the drug-courier profile with reasonable suspicion. Royer was not seized (as was Sokolow) when initially approached, and therefore the officers properly discovered that he was traveling under an alias, since the name they observed on his luggage was different that the name on his license and ticket. It was this indication of ongoing criminal activity, and not the factors of the profile noted by the Court, *see id.* at 493 n.2 (opinion of White, J.), that justified the stop. As the plurality noted,

> when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers – paying cash for a one-way ticket, the mode of checking the two bags, and

> Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a way that did not exceed the limits of an investigative detention.

Id. at 502 (opinion of White, J.). Only once the evidence of ongoing criminal activity (traveling under an alias) was established, did other factors, such as payment in cash, become relevant to support or controvert the reasonableness of the officers' suspicion.

In this case, as opposed to *Royer*, there was no evidence of ongoing criminal activity, specifically the use of an alias. The fact that Sokolow's voice was on an answering machine for a phone listed under the name of his roommate Karl Herman does not provide a basis for suspecting that Sokolow was using an alias. In contemporary society it is not unusual for persons with different last names to share a common residence and telephone. Nor it is unusual for a member of the same household to dictate prerecorded messages on the answering machine even though his or her name is not listed with the phone company as the subscriber. Thus the fact that a discrepancy existed between the name that Sokolow gave to the airline and the name under which his phone was listed is not evidence of an alias—a legitimate indicator of ongoing criminal activity. It was only when Sokolow stated that his true name was Sokolow but that he was travelling under his mother's maiden name of Kray that the agents had a valid reason to believe that Sokolow was travelling under an assumed name. That, however, occurred *after* the seizure. In sum, the agents' belief before the seizure that Sokolow was travelling under an alias was unwarranted and cannot be used as a ground for bringing this case in line with *Royer*. In the absence of this evidence of alias, or some other

evidence of an ongoing criminal activity, the agents' seizures of Sokolow cannot be justified.

Judge Brocton identifies a final Supreme Court drug-courier profile case in *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam). *See* Brocton, *supra*, at 422. Although the case does not mention the profile, the type of stop and its justification suggest the profile in operation. In any event, the case does not present a change in the requirement of evidence of ongoing criminal activity. The court noted that, prior to the stop, the defendants engaged in evasive behavior and made contradictory statements regarding their knowledge of each other. *Id.* at 6. Such behavior is consonant with an ongoing criminal enterprise.

In summary, the Court consistently has required that an officer's suspicion be supported by evidence of ongoing criminal activity. Such behavior cannot be intuited from a hodgepodge assembly of "factors" about individual character rather than criminal acts. It must demonstrate the ongoing commission of a crime. The list of such actions would be extensive. Evasion and traveling under an alias are among the most common. Until such evidence of an ongoing crime is developed, however, other factors are irrelevant to reasonable suspicion. Once evidence of ongoing criminal behavior is produced, then other factors may confirm or contradict the reasonableness of suspicion, but other factors may not alone support a stop.

C.

We are left to apply our interpretation to the seizure of Sokolow at the curbside of the Honolulu airport. The six factors proffered by the government fail to indicate an ongoing criminal enterprise. The government suggests that Sokolow's nervousness while awaiting a connecting flight in Los Angeles, when considered in the context of the other evidence, presented a reasonable suspicion of ongoing criminal activity. There is no evidence on the record to

indicate that Sokolow's nervousness was indicative of an attempt to evade detection. *Cf. Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.) ("[T]he respondent, who appeared very nervous, engaged in behavior that the agents believed was designed to evade detection.")[10] Nervousness would appear to be a normal human reaction to air travel today, with a seemingly growing risk of mid-air collision and the near certainty of delays that may interrupt the plans of travelers. *See generally Year of the Near Miss*, Newsweek, July 27, 1987, at 20. We thus find nothing in the evidence discovered by the government that would create a reasonable suspicion that Sokolow was engaged in an ongoing criminal enterprise.

The government assures us that "[t]he combination of facts in this case will rarely, if ever, describe an innocent traveler." Gov't Pet. for Reh'g at 13. The obvious lack of substantiation for this claim betrays its lack of merit. That courts have ultimately found no Fourth Amendment violation in cases that mention these factors can hardly serve to confirm these factors as justification for searches and seizures. In sum, the vague and inchoate profile presented here best serves as an investigative tool. *See* Brocton, *supra*, at 471 ("[C]ourts should consider the profile as 'nothing more than an administrative tool of the police.' ") (quoting *United States v. Berry*, 670 F.2d 583, 600 (5th Cir. Unit B 1982)). It is hazy in form, susceptible to great adaptations, and almost entirely spectulative. It may generate good police work, but absent more it certainly would generate bad law.

CONCLUSION

Since we do not believe that the government has demonstrated that it had a reasonable suspicion that

[10] That the pluarlity in *Royer* mentioned nervousness as part of the profile, 460 U.S. at 493 n.2, cannot be considered an acceptance that nervousness creates reasonable suspicion.

Sokolow was engaged in criminal activity, we reverse the district court and order suppression of the evidence illegally seized. We therefore do not reach questions related to the acts subsequent to Sokolow's curbside detention.

REVERSED and REMANDED.

WIGGINS, Circuit Judge dissenting:

If the present opinion becomes the law of this circuit, I conclude that many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics may fail on constitutional grounds. Because I believe such an unfortunate result is not mandated by the law, I respectfully dissent.

The fourth amendment prohibits unreasonable searches and seizures. Courts determine the reasonableness of a search or seizure by "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967). In determining whether a particular search or seizure is reasonable, the Supreme Court has developed a three-tier structure of fourth amendment jurisprudence. The first category includes consensual police-citizen encounters, such as brief stops for questioning. Here no seizure occurs and the fourth amendment is not implicated. *See Florida v. Royer*, 460 U.S. 491, 497 (1983); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). The second level consists of brief investigative detentions and pat downs of outer clothing. Because these intrusions are "seizures," law enforcement officials must have a reasonable, articulable suspicion that the suspect has recently committed a crime or is about to commit one. *See Terry*, 392 U.S. at 21; *Adams v. Williams*, 407 U.S. 143, 146 (1972). The third category comprises full-scale searches or arrests requiring probable cause. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964).

I agree with the majority that a fourth amendment seizure occurred in this case when the DEA agents approached defendant Sokolow at the curbside. A person is seized when his freedom of movement is restrained by means of physical force or a show of authority. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.); *Terry*, 392 U.S. at 16. The DEA agents grabbed Sokolow by the arm, moved him away from the curb, and seated him before they began questioning. I also agree that this initial seizure was not sufficiently intrusive to constitute a full-scale arrest. The DEA momentarily detained Sokolow for questioning in an attempt to dispel their suspicions, exactly the type of behavior approved by the Court in *Terry*, 392 U.S. at 22-23. Although difficult line-drawing problems may arise in distinguishing an investigative stop from a de facto arrest, the seizure of Sokolow at curbside does not raise such a problem. The detention was brief, served the important law enforcement purpose of detecting drug couriers, and lasted no more than necessary to effectuate this purpose. *See United States v. Sharpe*, 470 U.S. 675, 685 (1985) (in distinguishing investigative stop from de facto arrest, court should consider brevity of stop, law enforcement purposes served, and time reasonably needed to effectuate those purposes).

The detention here was a second-tier, or *Terry* seizure and thus we determine its constitutionality by the reasonable articulable suspicion standard. The majority concludes that the agents did not possess this level of suspicion. This conclusion rests upon an unjustified parsing of the drug courier profile. The majority divides the profile into two types of elements first, those that the majority views as "consistent with an ongoing crime," such as the use of an alias or taking an erratic path through an airport, and second, elements that seek to identify personal characteristics shared by drug couriers. The majority finds

that regardless of the number of the second type of factors possessed by a suspect, the DEA cannot make any type of "seizure" unless the suspect exhibits a behavior that the majority terms "evidence of ongoing criminal behavior." According to this view, drug courier profile characteristics may not *ever* support reasonable suspicion in themselves, and can only be used to confirm or deny suspicion based on other factors.

I believe that the majority's approach seriously undermines the effectiveness of the drug courier profile as an investigative tool. The DEA developed the drug courier profile in the early 1970's as part of an effort to combat escalating drug smuggling through this nation's airways. The profile consists of a number of characteristics, all of which, both singly and collectively, are in themselves lawful. The DEA has determined, however, based upon its collective experience, that certain characteristics are commonly associated with drug couriers.[1] Specially trained and experienced DEA agents use this profile to identify suspected drug traffickers and their efforts have met with

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[1] The specific elements of the profile vary among airports, in accordance with the experience of DEA agents at a particular location. The original profile, developed in Detroit by DEA Special Agent Paul Markonni consists of seven "primary characteristics" and four "secondary characteristics." The primary characteristics are: 1) arrival from or departure to an identified source city; 2) carrying little or no luggage; 3) traveling by an unusual itinerary; 4) use of an alias; 5) carrying unusually large amounts of currency; 6) buying airline tickets with a large amount of small denomination currency; and 7) unusual nervousness. The secondary characteristics are; 1) the almost exclusive use of public transportation; 2) immediately making a telephone call after deplaning; 3) leaving a false call back number with the airline; and 4) excessive travel to source or distribution cities. *See Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. Rev. 843, 871 n.120 (1985) (citing *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979); *cert. denied*, 447 U.S. 910 (1980)).

some success. *See Mendenhall*, 446 U.S. at 562 (Powell, J., concurring) (during first eighteen months of profile program, DEA agents in Detroit searched 141 persons in 96 encounters, found controlled substances in 77 of these encounters, and arrested 122 persons).

Because conformance with some aspects of the profile could "describe a very large category of presumably innocent travelers," *Reid v. Georgia*, 448 U.S. 438, 441 (1981), the profile is not intended to provide a mathematical formula for establishing reasonable suspicion. But neither should DEA agents be completely precluded from stopping potential drug couriers for questioning based on profile characteristics. *See United States v. Berry*, 670 F.2d 583, 601 (5th Cir. 1982) (en banc) (match with some profile characteristics does not automatically support reasonable suspicion but the fact that characteristic appears on profile doesn't preclude its use as a justification for a stop); *United States v. Price*, 599 F.2d 494, 502 n.10 (2d Cir. 1979) (appropriate for reviewing court to take profile into account as it represents a "kind of institutional expertness"); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (set of facts may arise in which existence of profile characteristics constitutes reasonable suspicion although facts not sufficient in this case). The determination of reasonable suspicion must turn on the facts of each case. In other words, "the totality of the circumstances – the whole picture – must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981).

In evaluating the whole picture, a trained officer may draw inferences and make deductions that would escape an untrained observer. *Id.* at 418. Conduct seemingly innocent may, viewed as a whole, appear suspect to one familiar with the practices of drug smugglers and the methods used to avoid detection. *See Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979); *United States v. Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983); *United States v. Ramirez-*

Cifuentes, 682 F.2d 337, 342 (2d Cir. 1982). Moreover, this process "does not deal with hard certainties, but with probabilities," *Cortez*, 449 U.S. at 418, and does not lend itself to bright-line rules. Where experience shows that certain characteristics are repeatedly found among drug smugglers, "sheer logic dictates that . . . the existence of those characteristics in a particular case is to be considered" in the reasonable suspicion equation. *Royer*, 460 U.S. at 526-27 n.6 (Rehnquist, J., dissenting). The majority's approach, therefore, is overly mechanistic because conformity with a drug-courier profile could *never*, by itself, justify an investigative detention. This result is contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts that the Supreme Court has espoused in *Terry* and subsequent cases.

The majority contends that its mechanical view of the reasonable suspicion standard is "in harmony" with Supreme Court cases discussing the drug courier profile. This reading of the Supreme Court cases is unjustified. Although the Court has not delineated any explicit guidelines, it has approved the use of drug courier profile characteristics to support investigative stops. The Supreme Court first discussed the profile in *United States v. Mendenhall*, 446 U.S. 544 (1980). A majority of the Court found that the stop of the defendant was constitutional, but could not agree as to a rationale. Justice Stewart, joined by Justice Rehnquist, found that no seizure occurred when the defendant was approached by agents in the airport concourse, and so did not reach the issue of whether the drug courier profile could provide reasonable suspicion. *Id.* at 557 (opinion of Stewart, J.)

Justice Powell's concurring opinion, joined by Chief Justice Burger and Justice Blackmun, assumed that the initial encounter constituted a seizure, but found that it was justified by reasonable suspicion. This finding was based on the fact that Mendenhall met the following profile

characteristics: 1) she arrived in Detroit from Los Angeles, a source city, 2) she appeared nervous, "engaged in behavior that the agents believed was designed to evade detection," 3) she was the last to deplane, 4) she claimed no luggage, and 5) she changed airlines for her flight out of Detroit. *Id.* at 564 (Powell, J., concurring). Justice Powell emphasized that the agents were specially trained, and indicated that defendant's ostensibly innocent conduct could have had an entirely different meaning for the trained observer. *Id.* at 563-64. The majority here seizes on Justice Powell's comment that respondent "engaged in behavior . . . designed to evade detection" to support a legal conclusion that reasonable suspicion *always* requires evidence of ongoing criminal activity. Justice Powell expressly refuted this formalistic reading of the reasonable suspicion standard. Although he did not maintain that the drug courier profile *automatically* demonstrated reasonable suspicion, he noted that "[e]ach case raising a Fourth Amendment issue must be judged on its own facts." *Id.* at 565 n.6.

The Supreme Court again considered the constitutionality of airport drug stops in *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). The Court found that the DEA agents could not have reasonably suspected Reid of criminal activity based on the few profile characteristics observed. The agents knew only that: 1) Reid had arrived from Fort Lauderdale, 2) he arrived in the early morning, 3) he and his companion tried to conceal the fact that they were traveling together, and 4) they had no luggage other than shoulder bags. *Id.* at 441. Although the Court noted that three of these factors described a "very large category of innocent travelers," the court did not wholly reject reliance on the drug courier profile when more or different factors are present. While conformity with certain aspects of the profile does not automatically create reasonable suspicion, "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Id.*; *see also United*

States v. Erwin, 803 F.2d 1505, 1511 (9th Cir. 1986) (*Reid* does not preclude all reliance on profile characteristics; it simply indicates that most general characteristics cannot alone support a stop).

Subsequently, in *Florida v. Royer*, 460 U.S. 491 (1983), eight members of the Court found reasonable suspicion based on drug courier profile characteristics. The plurality held that the agents possessed sufficient suspicion for an investigative stop, but that the agents exceeded the permissible bounds of the stop when they moved Royer to a small room for questioning. *Id.* at 502-05 (opinion of White, J.). Both dissenting opinions agreed that the agents had reasonable suspicion for the initial detention. *See id.* at 518 (Blackmun, J., dissenting); *id.* at 524-25 (Rehnquist, J., dissenting).

The plurality relied on the following facts to support its finding of reasonable suspicion: 1) Royer was traveling under an assumed name, 2) he paid cash for a one-way ticket, 3) he wrote only a name and destination on his baggage identification tags, and 4) his general appearance and conduct were unusual. *Id.* at 502 (opinion of White, J.). Although Justice White did not explicitly rely on the drug courier profile, all the characteristics he mentioned are commonly included. *See id.* at 493 n.2 (listing characteristics considered by DEA agents to be within the profile).

The majority in the present case contends that Royer's use of an alias was the requisite evidence of ongoing criminal activity that justified the stop; the other factors were then only relevant once the alias was discovered. This gloss of Justice White's opinion is wholly unsupportable. Justice White referred to the use of an alias in the reasonable suspicion equation, but he in no way suggested that the alias is the central or absolutely necessary factor that makes all the other factors relevant. Moreover, Justice White expressly rejected the view of the Florida

District Court of Appeals that "a mere similarity with the contents of the drug courier profile is insufficient even to constitute . . . articulable suspicion." *Id.* at 495 n.7.

I conclude, therefore, that a fair reading of Supreme Court precedent is that conformity with drug courier profile charactertistics does not automatically provide reasonable suspicion, but can justify an investigative stop in a particular case. The fourth amendment requires a case-by-case determination, and on the facts of the case before us the DEA agents possessed reasonable and articulable suspicion that Sokolow was engaged in narcotics trafficking. The agents knew the following facts when they initially approached Sokolow at the airport curbside: 1) Sokolow had just returned to Hawaii from a three-day trip to Miami, a well known source city of drugs, 2) Sokolow paid for his ticket with cash from a large roll of twenty dollar bills, 3) neither Sokolow nor his companion checked any luggage, 4) Sokolow appeared very nervous and looked all around the waiting area during his layover, and 5) Sokolow used the name Andrew Kray on his airline tickets, but his voice was on an answering machine at a phone subscribed to by Karl Herman.

Viewed collectively, these articulable facts were sufficiently suspicious to justify a brief and minimally intrusive investigative detention. Of particular importance is the fact that Sokolow paid $2100 for his tickets from a stack of twenty dollar bills approximately double that amount. Innocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons. Certainly, this cash payment was inconsistent with a legitimate business trip; Sokolow left no paper trail for reimbursement for his expenses or for tax deductions.

Further, Sokolow's travel pattern belies any assumption that he traveled to Miami for a pleasure trip. He flew from Honolulu to Miami, a well known drug source city, on July 22 and returned on July 25, a very short time consider-

ing that it takes a minimum of ten hours to travel each way. Also, neither Sokolow nor his companion checked any luggage. These relatively anomalous characteristics enhance the suspicious circumstances of the large cash purchase of the tickets.

Finally, Sokolow was nervous during his layover in Los Angeles and glanced all around the waiting area, hardly a sign of an innocent traveler. The Supreme Court has recognized that nervousness can contribute to the reasonable suspicion calculation. *See Royer*, 460 U.S. at 493 n.2 (opinion of White, J.); *Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.); *see also Erwin*, 803 F.2d at 1511. The majority dismisses this evidence of nervousness because the record does not explicitly state that Sokolow's nervousness was indicative of an attempt to evade detection. I find no merit in this distinction. Sokolow's nervousness was certainly suspicious and was one of many relevant factors to be considered in determining whether the stop was justified.

In *Erwin*, this court concluded that arrival from a drug source city after a one day stay with only carry on luggage required further particularized evidence to establish founded suspicion. The *Erwin* court concluded that defendant's nervous behavior, circuitous route through the airport, and possible effort to conceal the truth fulfilled the requirement of particularized evidence. *Id.* at 1511. I submit that Sokolow's payment for his airline ticket in thousands of dollars in twenty dollar bills, coupled with his unusual travel pattern and nervous behavior are more objectively suspicious than the facts on which the *Erwin* court relied.[2]

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[2] The *Erwin* court relied heavily on defendant's use of an allegedly circuitous route through the airport to distinguish itself from *Reid* where defendant's arrival in the early morning from a drug source city without checked luggage was held to be too generalized to constitutionally warrant a *Terry* stop. I dissented in *Erwin* because I disagreed

My conclusion that Sokolow's seizure at curbside was supported by reasonable suspicion requires me to address Sokolow's additional arguments. Sokolow contends first, that investigative detention ripened into an arrest once he was moved to the DEA office, and second, that the retention of the three pieces of luggage the narcotics dog did not alert to exceeded the permissible limits of an investigative stop. I find that the detention of Sokolow and his luggage in the DEA office for the purpose of subjecting his luggage to a dog sniff was a permissible continuation of the investigative stop and did not constitute a de facto arrest.

The scope of a stop is reasonable if the officers' action is "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. When the facts support a rational and articulable basis to detain an individual, the mere fact that an individual is relocated does not transform the detention into an arrest. *See United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977); *see also Royer*, 460 U.S. at 504-05 ("[t]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area.")

Even a valid detention can become excessive if it lasts longer or is more intrusive than necessary. *See Sharpe*, 470 U.S. at 687. Here, Sokolow and his luggage were relocated to the DEA airport office simply because the narcotics

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with the majority that a circuitous route and possibly implausible explanation were sufficient facts to distinguish *Erwin* from *Reid*, and because I believed the record did not support the court's conclusion that the defendant was "nervous" before he was detained. I take the opposite view here because I believe the agents' suspicions were reasonably backed by specific facts that would not apply wholesale to innocent persons. *Erwin*, 803 F.2d at 1511-13 (Wiggins, J., dissenting).

detector dog was not allowed to examine luggage in a public area. The agents took only the minimally intrusive step of subjecting Sokolow's luggage to a dog sniff. *See United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff is minimally intrusive and does not constitute a search within the meaning of the fourth amendment). And the narcotics dog alerted to the luggage only thirteen minutes after the initial encounter between Sokolow and the DEA agents. *See Sharpe*, 470 U.S. at 687 (upholding twenty minute detention where agent pursued his investigation in a diligent and reasonable manner); *cf. Place*, 462 U.S. at 709 (finding ninety minute detention excessive where agents knew of defendant's scheduled arrival and could have been more diligent in arranging investigation). The temporary relocation and brief detention were not, under the circumstances, so unreasonable as to constitute as impermissible de facto arrest.

Contrary to Sokolow's position, the decision in *Royer* does not dictate a different result. The Court found in *Royer* that the officers' conduct in removing Royer to a small, windowless room for interrogation was "more intrusive than necessary to effectuate an investigative detention. . . ." 460 U.S. at 504 (opinion of White, J.). First, the Court noted that the defendant was apparently relocated for no other reason than to obtain his consent to a search of his luggage. *Id.* at 505. Here, on the other hand, narcotics dogs were not allowed in the public areas of the airport and therefore important safety and security reasons justified the relocation. Second, the Court pointed out that the narcotics agents could feasibly have investigated the contents of Royer's bags in a more expeditious manner by using trained dogs. *Id.* at 505. This recommended investigative technique was exactly the one used in the instant case.

Once the narcotics dog alerted to the brown shoulder bag, the DEA agents had probable cause to arrest

Sokolow. *See Royer*, 460 U.S. at 506. The positive alert also provided probable cause to obtain a search warrant and to detain the bag pending issuance of the warrant. *See Place*, 462 U.S. at 701-02; *United States v. Martell*, 654 F.2d 1356, 1360 (9th Cir. 1981), *cert. denied*, 463 U.S. 1213 (1983). Sokolow argues, however, that the agents impermissibly detained the three pieces of unalerted to luggage for an additional 170 minutes until the first bag was searched, exceeding the 90 minute detention the Court found unreasonable in *Place*. 462 U.S. at 709.

This case, unlike *Place*, did not involve an investigative detention, but rather the detention of a person's luggage as incident to his lawful arrest. Thus, the luggage detention did not implicate any of the fourth amendment interests discussed in *Place*. First, Sokolow's privacy interest in the *contents* of his luggage was not impaired by the the agents simply holding his luggage. *Cf. id.* at 706-07. Second, Sokolow's liberty interest in proceeding with his trip was not implicated because he was restrained not by the detention of his luggage, but by his lawful arrest. *Cf. id.* at 708. And third, Sokolow had a possessory interest in his luggage. *Id.* But these agents could reasonably assume that an arrestee wants his property held in safekeeping, especially considering that Sokolow made no other request regarding the disposition of his luggage.

After the search of the shoulder bag yielded no apparent narcotics, the probable cause to hold Sokolow and his remaining luggage evaporated. The subsequent detention of the luggage for a second dog sniff, however, was justified by new grounds for reasonable suspicion that arose after the first dog sniff. The government contends that this suspicion existed on the basis of the following: 1) Sokolow had been identified as a cocaine customer, 2) Sokolow made a statement that he was in big trouble, 3) he possessed other used airline tickets to Miami and hotel receipts under the name Kray, 4) he had other used airline

tickets to Miami under yet a third name, 5) he kept a debit sheet consistent with drug records, and 6) he carried an address book containing the names and addresses of suspected drug traffickers. Under these circumstances, it was reasonable to detain the remaining luggage for 35 minutes to subject it to a second dog sniff. The dog's second alert constituted probable cause to detain the alerted to bag until the agents obtained a search warrant. The search pursuant to a valid warrant uncovered the over 1000 grams of cocaine that Sokolow seeks to suppress.

In sum, the majority's approach effectively throttles the effort of drug enforcement agents to combat escalating narcotics trafficking. The fourth amendment protects against *unreasonable* searches and seizures. In my view, it is entirely reasonable for agents to detain and question a suspected drug courier briefly based upon a rational profile. Therefore, the district court did not err in refusing to suppress the over 1000 grams of cocaine seized from defendant Sokolow.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 84-02200-01 SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF HAWAII
SAMUEL P. KING, District Judge, Presiding

Argued and Submitted
July 12, 1985—San Francisco, California
Remanded for Additional Findings, July 31, 1986
Resubmitted, October 31, 1986

Filed January 28, 1987

OPINION

Before: WARREN J. FERGUSON, WILLIAM A. NORRIS and CHARLES WIGGINS, Circuit Judges.

Opinion by Judge NORRIS; Dissent by Judge WIGGINS

OPINION

NORRIS, Circuit Judge:

Andrew Sokolow appeals his conviction for possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Sokolow entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2), thereby reserving the right to appeal the district court's denial of his motion to suppress certain evidence allegedly obtained in violation of the Fourth Amendment. The Fourth Amendment challenges are based on Sokolow's detention at the Honolulu airport and the search of his carry-on luggage subsequent to a dog alert for narcotics. We have jurisdiction under 28 U.S.C. § 1291, reverse the district court's denial of the motion to suppress, and remand.

FACTS

On Sunday, July 22, 1984, Sokolow purchased two round trip tickets to Miami at the United Airlines counter at Honolulu Airport. Sokolow paid for the $2100 tickets out of a large wad of $20 bills, purchasing them under the names of Andrew Kray and Janet Norian. The ticket agent notified drug task force agent John McCarthy of the purchase. Agent McCarthy called the telephone number given to the ticket agent by Sokolow. The call was answered by a recorded message on an answering machine. Upon listening to a tape of this message, the ticket agent identified the voice as that of Sokolow. Agent McCarthy determined that the number was subscribed to by Karl Herman at 348-A Royal Hawaiian Ave., Honolulu, Hawaii. What Agent McCarthy apparently did not know at that time was that both Herman and Sokolow lived at this address. On July 24, Agent McCarthy learned that Sokolow was scheduled to return to Honolulu the following day with a female companion, Janet Norian. On July 25, agents at the Los

Angeles airport confirmed that Sokolow and Norian were aboard the flight to Honolulu. Sokolow was wearing a black jumpsuit and a large amount of gold jewelry.

Traveling with carry-on luggage only, Sokolow and Norian arrived at Honolulu airport and proceeded directly to the street to hail a taxi. They were at the curbside waiting for a taxi when several Drug Enforcement Administration (DEA) agents approached them. As found by the district court, the agents grabbed Sokolow by the arm, pulled him onto the walkway, and sat him down. Agent Kempshall then asked Sokolow for his airline ticket and identification. Sokolow responded that he was not carrying any identification and did not have his airline ticket. Sokolow further stated that, although his name was Sokolow, he was using his mother's maiden name of Kray, and that he had not made the reservations himself. Sokolow, Norian, and their luggage were then taken to a DEA office in the airport.

In the DEA office, the luggage was turned over to a Customs Service dog handler for examination by a narcotics detector dog. The narcotics detection dog alerted to a brown shoulder bag. Based on this information, the agents placed Sokolow under arrest and proceeded to secure a warrant to search the shoulder bag. Although the search uncovered no drugs, it did uncover certain papers that prompted the agents to have the narcotics detection dog reexamine the remaining three pieces of luggage. This time the dog alerted to a medium sized carry-on bag. Ultimately, another narcotics detection dog confirmed this alert. The agents searched the medium-sized bag pursuant to a warrant and found 1,000 grams of cocaine.

Sokolow was indicted for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). The district court denied his motion to suppress all statements and evidence secured pursuant to his seizure, his

arrest, and the search of his luggage. Sokolow entered a conditional guilty plea thereby preserving his right to challenge the district judge's ruling on his Fourth Amendment claims. Concluding that reversal was a possibility because the case was a "close one," the district judge granted Sokolow bail pending appeal.

DISCUSSION

The disposition of this case turns on two key questions:[1] (1) at what point did the agents seize Sokolow?; and (2) at the moment of seizure, did the agents have information supporting a reasonable and articulable suspicion that Sokolow was engaged in criminal activity? We conclude that Sokolow was seized when he was grabbed by the arm and sat down at the curbside. This was before any questioning began. We also conclude that at the time they seized Sokolow, the agents did not have a basis for a reasonable and articulable suspicion that Sokolow was engaged in criminal activity. As a consequence, the seizure violated the Fourth Amendment, and all the subsequent evidence uncovered must be suppressed.

Without making any specific findings of fact, the district court originally ruled that the initial contact between the agents and Sokolow at curbside did not rise to the level of a seizure, citing *Florida v. Royer*, 460 U.S. 491, 497 (1983) for the proposition that "[t]here is no Constitutional infringement when an officer merely ap-

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[1] Sokolow also argues (1) that the investigatory detention of him ripened into an arrest unsupported by probable cause when he was moved to the DEA office and (2) that the detention without probable cause of the three pieces of luggage the narcotics dog did not alert to exceeded the permissible limits of an investigatory detention. Although these arguments raise interesting and complex issues, we need not address them because we conclude that the initial seizure of Sokolow was unconstitutional.

proaches and speaks to an individual in a public place." However, this ruling has since been cast into considerable doubt by the district court's findings on remand,[2] which belie the apparent assumption that this case involved nothing more than agents approaching and speaking to a suspect in a consensual manner. The district court accepted on remand defendant's contention that the agents grabbed Sokolow by the arm and moved him back to a seat before they asked him questions. Although the "federal agents do not remember the event in the same way," the district court found that the government had not met its burden of proof on the issue. Moreover, the district court also found on remand that "[a]t the initial curbside stop, Sokolow did reasonably believe he was *not* free to leave." (emphasis added). Unfortunately, the court was ambiguous about whether it was merely finding that Sokolow held this reasonable belief after being questioned and told his luggage would be detained or whether it was also finding that Sokolow had this reasonable belief before the questioning. If the latter, then there can be no doubt that Sokolow was seized before the curbside questioning began. *See INS v. Delgado,* 466 U.S. 210, 215 (1984) (a person has been seized if under the circumstances a reasonable person would have believed he was not free to leave); *United States v. Patino,* 649 F.2d 724, 727-28 (9th Cir. 1981) (same). But even absent a specific finding that Sokolow reasonably believed he was not free to leave at the moment he was physically grabbed, we hold that Sokolow was seized at that moment.

We review the district court's determination as to whether a seizure occurred de novo. *See LaDuke v. Nelson,* 762 F.2d 1318, 1327 (9th Cir. 1985). Although we certainly have no quarrel with the proposition that police do not seize a person within the meaning of the Fourth Amendment by merely approaching him and asking him

[2] After argument, we vacated submission and remanded to the district court for additional findings of fact on specified issues.

questions in public, we think it clear that the initial curbside contact in this case did not involve such a consensual encounter. Physically grabbing, moving, and seating a suspect to ask questions, even in public, clearly restrains that suspect's liberty in a nonvoluntary way. Indeed, the use of physical means to restrain a person's movement is the most obvious form of seizure. *See e.g., Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968); *United States v. Mendenhall,* 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J.); *Patino,* 649 F.2d at 728 (stating that physical restraint is the "most obvious" form of seizure). Thus we hold that Sokolow was seized at the point he was grabbed and seated, and before any questioning began.

Although not all seizures require probable cause, "any curtailment of a person's liberty by the police must be supported by at least a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia,* 448 U.S. 438, 440 (1980) (per curiam). We review the district court's conclusion that a reasonable suspicion existed de novo.[3] *United States v. Sutton,* 794 F.2d 1415, 1425 (9th Cir. 1986); *United States v. Maybusher,* 735 F.2d 366, 371 & n.1 (9th Cir. 1984), *cert. denied,* 469 U.S. 1110 (1985). Although the issue is a close one, we conclude that a reasonable and articulable suspicion did not exist at the time the agents grabbed Sokolow by the arm and sat him down.[4]

The district court based its conclusion that the initial curbside stop was supported by a founded suspicion in part on the facts that Sokolow admitted he was not traveling under his real name and that he told the agents he did

[3] We accept as not clearly erroneous the findings of fact upon which the district court based its conclusion that reasonable suspicion existed.

[4] The government has not argued on appeal that a reasonable suspicion existed at the time they first began questioning Sokolow, contenting itself with arguing that the initial contact was not a seizure at all.

not have his ticket even though he had just gotten off the plane. We disagree. The initial seizure, which we hold occurred when the agents first grabbed Sokolow, must be based upon a reasonable and articulable suspicion that existed at that time. It cannot be based on information that is a fruit of the seizure itself.[5] *See United States v. Erwin,* 803 F.2d 1505, 1510 n.2 (9th Cir. 1986).

The agents knew only the following facts matching their "drug courier profile" when they first approached Sokolow: (1) that Sokolow had just returned from a three-day trip to Miami, a well-known source city for drugs; (2) that Sokolow had paid for his tickets out of a large wad of $20 bills; (3) that neither Sokolow nor Norian checked any luggage; (4) that Sokolow changed planes en route to Hawaii; (5) that Sokolow dressed in a black jumpsuit and wore a lot of gold jewelry; and (6) that Sokolow had his voice on an answering machine at a phone subscribed to be Karl Herman but told the airline his name was Andrew Kray. The agents did not know at the time of seizure that the defendant's true name was Sokolow.[6]

Facts (5) and (6) are not permissible grounds for formulating a reasonable suspicion. We fail to see what could

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[5] Likewise, Sokolow's statements during the curbside questioning cannot be used to support a reasonable suspicion to detain his luggage. Because these statements were the fruit of the illegal seizure of Sokolow, and because we hold that, absent those statements, no reasonable suspicion existed to detain the luggage for a dog sniff, the evidence discovered in that luggage was a fruit of the illegal seizure of Sokolow and must be suppressed.

[6] On remand, the district court also noted that a report indicated Sokolow was acting "in a suspicious manner" during his layover in Los Angeles. However, this allegedly suspicious activity is not mentioned, relied upon, or described in any other findings of the court or the magistrate. We decline to give any weight to a generalized conclusion that a report indicated a suspect acted "suspicious" without any further detail.

possibly be suspicious about wearing a black jumpsuit and gold jewelry. We think it is not consistent with the Fourth Amendment for the police to interfere with a person's liberty because of the way he dresses absent some indication that the particular dress bears some logical connection to the suspected criminal activity. Style of clothing, as an indicator of life-style, is an extremely unreliable ground for suspecting ongoing criminal activity. *Cf. Erwin,* 803 F.2d at 1511 n.2 (admission that suspect "had smoked a small amount of marijuana at some undisclosed time bears no reasonable relationship to the question of whether he was then engaged in the unlawful transportation of narcotics."). No one could object if the police thought there was something suspicious about a person leaving a bank wearing a stocking over his face. But the police can not act based upon sociological assumptions that people dressed in a particular way are prone to commit crimes. Not only is a person's fashion taste of no relevance to the likelihood that he or she is presently engaging in criminal activity, but basing police action upon such matters of person taste and style is offensive and implicates concerns about freedom of individual expression. Certainly no one can doubt that the police can not, even in part, justify an investigatory stop of a person suspected of insider trading because that person wears a pin-striped suit and a gold Cartier watch.

Nor is it in any way suspicious to give an airline one name when one's phone is subscribed to under a different name. The agents apparently inferred from their information that, since Sokolow had his voice on an answering machine at a phone subscribed to by Karl Herman but told the airline his name was Andrew Kray, he was traveling under a false name. There was no basis for this inference although it in fact turned out to be true. A vast number of innocent people share homes with people having different last names where only one person in the home is listed as the phone subscriber. The agents' belief that Sokolow was

traveling under a false name thus cannot be used as a ground for reasonable suspicion.

The only remaining grounds for the seizure were that Sokolow had taken only carry-on bags on a three-day trip to Miami, changing planes on the way back and buying his tickets in cash. These facts can be broken down into two types: those that clearly "describe a very large category of presumably innocent travelers" and those that arguably relate to the "particular conduct" of the defendant. *Reid,* 448 U.S. at 441; *see also Erwin,* 803 F.2d at 1511. Under *Reid,* "the most general of [courier profile] characteristics cannot support a *Terry* stop without more particularlized evidence of suspicious activity." *See Erwin,* 803 F.2d at 1511. The *Reid* Court described the following facts as too general to support a *Terry* stop alone: arriving from a known source city for cocaine at early morning when law enforcement activity is low with only carry-on luggage. *See* 448 U.S. at 441. We conclude that arriving on a connecting flight from a three-day trip to Miami with only carry-on luggage – facts (1), (3) & (4) – are also the type of general characteristics shared by a large category of innocent travelers that cannot support a *Terry* stop absent particularized evidence of criminal activity. Indeed, they probably encompass most travelers taking short trips to Miami from Honolulu since such travelers are likely to take only carry-on luggage with them for a short trip and probably cannot easily get a direct flight all the way from Miami to Honolulu.

The only fact remaining is that Sokolow paid for his tickets out of a large wad of cash. Although close, we do not consider this evidence alone to be particularlized evidence of suspicious activity. Particularlized evidence must raise suspicions of *ongoing* (or recently completed) criminal activity. *See Reid,* 448 U.S. at 440 (must have reasonable "suspicion that the person seized *is engaged* in

criminal activity." (emphasis added)); *Erwin,* 803 F.2d at 1510 n.2 (rejecting one fact as a basis for reasonable suspicion because it bore no reasonable relationship to the question of whether the suspect "was *then engaged* in the unlawful transportation of narcotics." (emphasis added)). Sokolow's payment in cash is quite unlike a suspect's looking around to see if he was being watched, appearing nervous, taking evasive action, or using an alias while traveling, all of which at least tend to raise a suspicion that criminal activity is going on *at that time. See, e.g., Florida v. Rodriguez,* 469 U.S. 1, 6 (1984) (evasive action); *Florida v. Royer,* 460 U.S. 491, 502 (1983) (used alias); *Terry,* 392 U.S. at 6 (casing store); *Erwin,* 803 F.2d at 1511 (looked over shoulder, appeared nervous, took evasive action); *United States v. Betancur-Bustamonte,* 799 F.2d 1388, 1394 (9th Cir. 1986) (nervous, evasive); *see also United States v. Greene,* 783 F.2d 1364, 1366 (9th Cir. 1986) (tip regarding crime). The suggested inference that payment in cash for airplane tickets alone is suspicious seems to be that people who pay in cash are more likely to be criminals and thus more likely to be engaging in criminal activity at any given moment. Such an inference from payment of cash for airplane tickets alone strikes us as too attenuated to justify a Fourth Amendment seizure. We thus decline to penalize the use of legal tender in buying airplane tickets.

But even if we did consider cash payment for airplane tickets to be particularized evidence of suspicious activity, it would not be sufficient to justify a forcible detention. In *Reid,* the Supreme Court held that a *Terry* stop was unjustified where "the only particularized evidence was the defendant's apparent effort to conceal the fact that he was traveling with another person. *See* 448 U.S. at 441." *Erwin,* 803 F.2d at 1511. Sokolow's payment for his tickets in cash is certainly no more suspicious than a suspect's attempts to conceal the identity of his traveling companion.

In conclusion, we hold that Sokolow was seized at the moment he was grabed by the agents, and that at the time of this seizure the agents did not have a reasonable and articulable suspicion. Because this seizure thus violated the Fourth Amendment, all evidence acquired after the curbside seizure must be suppressed. We therefore reverse the district court's denial of Sokolow's motion to suppress and remand this case to the district court with instructions that Sokolow be permitted to withdraw his guilty plea. *See* Fed. R. Crim. P. 11(a)(2).

REVERSED AND REMANDED.

WIGGINS, Circuit Judge, Dissenting:

If the present opinion becomes the law of this circuit, I conclude that many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics may fail on constitutional grounds. Because I believe such an unfortunate result is not mandated by the law, I respectfully dissent.

Under a limited exception to the fourth amendment rule that seizure of a person requires probable cause to arrest, an agent may justifiably detain a person if the agent is aware of specific and articulable facts creating a reasonable suspicion that the person has committed or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 1, 21-22 (1968); *Florida v. Royer,* 460 U.S. 491, 498 (1983). One important law enforcement tool developed by the Drug Enforcement Administration to aid in the detection of drug traffickers is the so-called "drug courier profile". The profile involves a number of characteristics, all of which, both singly and collectively, are in themselves lawful. Because conformance with some aspects of the profile could "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures," *Reid v. Georgia,* 448 U.S. 438, 441 (1980), the particular facts in each case must support a reasonable suspicion of criminal activity before a *Terry* stop is justified, *id.*

In this case, the question is whether the agents possessed reasonable and articulable suspicion that Sokolow was engaged in narcotics trafficking. First, the evidence discloses that Sokolow paid $2100 for his tickets from a stack of twenty dollar bills approximately double that amount. Although the question is close, I agree with the court that standing alone this evidence is not enough to support a valid *Terry* stop. However, such activity is sufficiently supicious that the addition of few other relatively anomalous characteristics could support a founded suspicion of illegal activity. Innocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons, and narcotics agents would be unlikely to ensnare a "large category of presumably innocent" persons, *Reid,* 448 U.S. at 441, if this characteristic were accorded substantial weight. I do not understand the court's contention that carrying such a wad of bills is not evidence of "ongoing" criminal activity, while "appearing nervous, or taking evasive action" is such evidence. People may be nervous for a variety of reasons, one of which is that they are engaged in illegal activity. People may also carry large amounts of cash for a variety of reasons, one of which is to conceal illicit travel patterns, or to buy drugs.

Despite the majority's assertion, the agents did not rely *alone* on the cash payment to the airline. They also traced Sokolow's travel pattern. He flew from Honolulu to Miami, a known drug source city, on July 22, and returned on July 25, a very short time when one considers it takes a minimum of ten hours to travel each way. He carried no carry-on luggage. These relatively anomalous characteristics serve to enhance the suspicious circumstances of the large cash purchase of the tickets. In *United States v. Erwin,* 803 F.2d 1505, 1511 (9th Cir. 1986), this court concluded that arrival from a drug source city after a one day

stay with only carry-on luggage required further particularized evidence to establish founded suspicion. The *Erwin* court concluded that defendant's nervous behaviour, circuitous route through the airport and possible effort to conceal the truth fulfilled the requirement of particularized evidence. I submit that this defendant's payment of his airline ticket with thousands of dollars in twenty dollar bills coupled with his general travel pattern and behavior are more objectively suspicious than the facts on which the *Erwin* court relied.[1]

The majority has decided there was not reasonable suspicion for a *Terry* stop by looking at each evidentiary factor discretely. We should view the whole mosaic rather than each tile. *United States v. Ramirez-Cifuentes,* 682 F.2d 337, 342 (2nd Cir. 1982). Defendant's conduct established a reasonable suspicion of narcotics trafficking sufficient to warrant a valid investigative stop.

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[1] The *Erwin* court relied heavily on defendant's use of an allegedly circuitous route through the airport to distinguish itself from *Reid* where defendant's arrival in the early morning from a drug source city without checked luggage was held to be too generalized to constitutionally warrant a *Terry* stop. I dissented in *Erwin* because I disagreed with the majority that a circuitous route and possibly implausible explanation were sufficient facts to distinguish *Erwin* from *Reid,* and because I believed the record did not support the court's conclusion that the defendant was "nervous" before he was detained. I take the opposite view here because I believe the agents' suspicions were reasonably backed by specific facts that would not apply wholesale to innocent persons. *Erwin,* 803 F.2d at 1511-13 (Wiggins, J., dissenting).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. 85-1021
D.C. Crim. No. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

[Filed Sep. 23, 1986]

FINDINGS PURSUANT TO REMAND ORDER

After hearing, this court has made the following findings:

1. *At the initial curbside stop, Sokolow did reasonably believe he was not free to leave.* According to Sokolow, when approached by the federal agents he was taken by the arm and moved back to sit down. The federal agents do not remember the event in the same way. However, the government has the burden of proof on this issue, and defendant's account is reasonably believable. After being seated, defendant was asked to provide identification and his airline ticket. He was told that his bags would be taken to the customs area to be sniffed by a dog. He was reasonable in his belief that he was not free to leave at this time although it is true that he did not actually ask the agents if he could leave.

2. *The initial curbside stop was supported by a founded suspicion that Sokolow was engaged in criminal activity.* Information available to the federal agents about

Sokolow was consistent with a drug courier profile. Sokolow paid for two round-trip tickets at a cost of $2,100 out of a roll of $20 bills. The trip to Miami, a known source city of drugs (particularly cocaine), involved a short turn-around time. He was travelling with no checked luggage, under a name which was not related to the address which he gave the airline although the voice on the answering machine at that address was identified as that of the ticket purchaser. In addition, a report from Los Angeles indicated that he was acting in a suspicious manner during the layover for this return flight. The name which he gave to the agents was not the name under which he was travelling and even though he had just gotten off the plane, he told the agents he did not have his ticket. The agents had a reasonable and articulable suspicion that Sokolow was engaged in drug-related criminal activity.

3. *Sokolow did not consent to accompany the officers into the DEA office.* The government has not sustained the burden of proving that Sokolow consented to accompany them to the area where the luggage was to be sniffed by the narcotics detector dogs. Under the circumstances, it is doubtful he believed he had a choice. Following the initial "alert" by the dog, but prior to being removed from the general customs area to the DEA office, Sokolow was in fact placed under arrest although he was released later that evening.

4. *The detention of Sokolow in the DEA office constituted "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."* There is no lesser intrusive alternative available at the Honolulu airport for the use of the narcotics detector dog. The court takes judicial notice of the fact that United Airlines generally uses baggage claim area 16/17. This area is at the far end away from the customs area at a distance of approximately 900'. Bringing the dog to the

more public area of the airport would not be a reasonable procedure.

Once in the customs area, the agents did not search Sokolow's bag until the narcotics dog alerted to it and a search warrant was obtained. While the agents waited for the search warrant, they placed Sokolow under arrest and at this time removed him to the DEA office. When the search revealed no visible evidence of cocaine, the dog again sniffed the bags and alerted to a second bag. It was then 9:30 P.M., and the agents were unable to obtain a second warrant until the following morning. Sokolow was released, but the bags were (and still are) retained.

DATED: Honolulu, Hawaii, September 23, 1986.

/s/ Samuel P. King
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 84-02200-01 SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

[Filed July 31, 1986]

AMENDED ORDER

Before: FERGUSON, NORRIS and WIGGINS, Circuit Judges.

Submission of this case is hereby vacated. The case is remanded for a period of 90 days with the limited purpose of making the following findings:

1. Whether, at the initial curbside stop, Sokolow reasonably believed that he was not free to leave.

2. Whether the initial curbside stop was supported by a founded suspicion that Sokolow was engaged in criminal activity.

3. Whether Sokolow consented to accompany the officers into the DEA office.

4. Whether the detention of Sokolow in the DEA office constituted "the least intrusive means reasonably

available to verify or dispel the officer's suspicion in a short period of time." *See Florida v. Royer*, 460 U.S. 491, 500 (1983).

This panel shall retain jurisdiction over the appeal following remand when the case will be resubmitted without further order from this court.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Crim. No. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW SOKOLOW, DEFENDANT

[Filed Feb. 12, 1985]

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter having come before this Court for de novo hearing on December 11, 1984, upon defendant Andrew Sokolow's written objections to Magistrate's Report and Recommendation Denying Defendant's Motion to Suppress Evidence filed on November 26, 1984; and defendant Andrew Sokolow having been personally present and represented by counsel at such hearing; and this Court having considered the evidence and having reviewed the records and files herein and the arguments of counsel; and being fully advised in both the law and facts; this Court now makes the following findings and orders:

1. The evidence presented in the case indicates that on July 22, 1984, the defendant Andrew Sokolow purchased two round trip tickets from Honolulu, Hawaii, to Miami, Florida, for himself and a female companion, departing on July 22, 1984, and with an open return. The defendant purchased such tickets under a false name. The defendant paid for such tickets in cash, by giving the ticket agent a

large stack of $20 bills from which the agent took $2,100 and returned the remainder to the defendant. The defendant did not have any checked luggage. The defendant flew to Miami and returned to Honolulu on July 25, 1984. He was met at the airport by DEA Special Agent Richard Kempshall, who approached him at the curbside outside the building and asked him for his airline ticket and identification. The defendant stated he had no identification, was not in possession of his ticket, flew to Miami under a false name, and had not made the reservations for the flight himself. The defendant's luggage was returned to an area inside the airport so that it could be examined by a narcotics detector dog. The dog alerted to a brown shoulder bag, indicating the presence of narcotics therein. Based on this information, narcotics agents arrested Sokolow and obtained a federal search warrant for the brown shoulder bag. The bag was searched pursuant to the warrant and did not appear to contain any narcotics. However, the bag did contain two different used airline tickets under two different names, neither of which belonged to the defendant, from Honolulu to Miami and back, as well as Miami hotel receipts corresponding to the travel dates on the used airline tickets, as well as other suspected narcotics-related material. Furthermore, pending issuance and execution of the original warrant, another individual, who had been in the past been [*sic*] arrested more than 20 times for narcotics and/or prostitution violations, was brought into the office on unrelated charges and identified the defendant Sokolow as a person she knew who had been buying two to three "papers" of heroin a day from her supplier. After the apparently unsuccessful search of the original bag, the narcotics detector dog reexamined the other pieces of luggage carried by the defendant and his female companion, and alerted to a second bag, indicating the presence of a controlled substance

therein. By this time it was 9:30 at night, and the agents waited until the next morning before obtaining a second warrant. By that time, the luggage had been examined by a second narcotics detector dog who, under a different handler, alerted to the same piece of luggage. A search of the second bag pursuant to a federal search warrant resulted in the seizure of approximately 1,000 grams of cocaine. A third federal search warrant was subsequently obtained for a safety deposit box, a search of which produced, *inter alia*, $1,500 in $20 bills.

2. The initial contact of the defendant did not rise to the level of a seizure within the meaning of the Fourth Amendment. There is no Constitutional infringement when an officer merely approaches and speaks to an individual in a public place. *Florida* v. *Royer*, 460 U.S. 491 (1983). *United States* v. *Woods*, 720 F.2d 1022 (9th Cir. 1983). Nor is there any Constitutional intrusion when an agent asks for identification, a driver's license, or an airplane ticket. *Florida* v. *Royer, supra. United States* v. *Woods, supra.*

3. The examination of the defendant's luggage was based on observations recognized as elements of a "drug courier profile," including the fact that the defendant paid for the round trip airline tickets in cash; the cash consisted of a role of $20 bills; the tickets were for a very short trip to Miami, a known source city for drugs; the defendant was travelling under an assumed name; neither the defendant nor his girlfriend had any checked luggage; and that the defendant could produce neither any identification nor his airline tickets. Under *Florida* v. *Royer, supra,* those observations constituted a reasonable and articulable basis for the belief that the defendant was a drug courier. The brief detention of the luggage for submission to examination by a trained narcotics detector dog was therefore not improper. *United States* v. *Place, __ U.S. __, 103 S.Ct. 2637 (1983).*

4. Subjecting the defendant's luggage to an examination by a trained narcotics detector dog was not a search, and need not have been justified by probable cause. *United States* v. *Place, supra.* Nor did the detention of the defendant's luggage for the 13 minutes necessary for such examination violate the guidelines articulated by the Supreme Court in *United States* v. *Place, supra.*

5. When a search of the first bag produced no visible narcotics but instead other airline tickets under a false name and records which appear to be consistent with being drug records, there was a reasonable suspicion to believe the drugs were contained in another bag sufficient to justify a second examination by the narcotics detector dog. The second alert by the narcotics detector dog was sufficient to detain the luggage until the next morning to obtain a search warrant, at which time a third alert by an independent narcotics detector dog reaffirmed the existence of probable cause to obtain the warrant. *United States* v. *Place, supra.*

THEREFORE, for the foregoing reasons, and based upon a de novo review of the defendant's motion, the Court finds that the defendant's motion to suppress should be *denied.*

SO ORDERED.

DATED: Feb. 11, 1985, at Honolulu, Hawaii.

/s/ Samuel P. King

SAMUEL P. KING
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE STATE OF HAWAII

CR. NO. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW SOKOLOW, DEFENDANT

[Filed Nov. 15, 1984]

MAGISTRATE'S REPORT AND RECOMMENDATION DENYING DEFENDANT'S MOTION TO SUPPRESS

I. *REPORT*

By notice of motion, motion to suppress evidence, and memorandum in support of motion to suppress evidence filed on October 10, 1984, defendant Andrew Sokolow moved the Court for an order suppressing as evidence any and all statements, and evidence, including but not limited to contraband seized as a result of the illegal search and seizure of defendant and defendant's luggage and other items in violation of defendant's rights under the Fourth Amendment to the United States Constitution.

On July 22, 1984, Honolulu Police Department and Airport Task Force Officer John McCarthy received information from a United Airlines ticket agent named John Birt indicating on that date Birt sold two round trip tickets in the names of Andrew Kray and Janet Norian from Honolulu to Miami, Florida, departing on July 22, and with an open return. The tickets were paid for in cash by the individual identifying himself as Andrew Kray, with Kray giving Birt a large stack of twenty dollar bills from which Birt took $2,100 and returned the remainder to

Kray. These facts were reported to the Drug Enforcement Administration who upon calling the telephone number given by Kray, determined that said number was subscribed to by a Karl Herman at 348-A Royal Hawaiian Avenue, Honolulu, Hawaii, said address being in fact the residence of Sokolow and Karl Herman.

On July 24, 1984, Agent McCarthy learned that return reservations from Miami to Honolulu had been made in the names of Andrew Kray and Janet Norian, with arrival in Honolulu on July 25, 1984. Drug Enforcement Agents in the city of Los Angeles, California, confirmed that Kray and Norian were aboard the flight to Honolulu.

At approximately 6:27 p.m. on July 25, 1984, Andrew Kray and Janet Norian were observed arriving at the Honolulu Airport with four carry-on bags. Kray and Norian proceeded directly to the street level and attempted to look for a taxi.

At approximately 6:41 p.m. on July 25, 1984, DEA Special Agent Richard Kempshall approached Andrew Kray outside the building and asked Kray for his airline ticket and identification. Kray stated that he had no identification, was not in possession of his airline ticket, flew to Miami using his mother's maiden name of Kray, and had not made the reservations for the flight himself.

Kray, now known as Sokolow, was asked to return to the U.S. Customs area, so that his luggage could be examined by a narcotics detector dog handled by U.S. Customs Service Officer Jerry Tomaino. At approximately 6:54 p.m. on July 25, 1984, the luggage was examined by a narcotics detector dog Donker. Donker alerted to a brown shoulder bag with black pockets, indicating the presence of narcotics therein.

Based on this information, narcotics agents arrested Sokolow and obtained a federal search warrant for the brown shoulder bag. The affidavit in support of the search warrant included the information that Donker was a cert-

ified U.S. Customs Service narcotics detector dog trained to identify the presence of controlled substances, and had done so previously and proven to be reliable in that capacity. The bag was searched pursuant to the warrant at approximately 8:55 p.m. on July 25, 1984, and did not appear to contain any narcotics. The brown shoulder bag did contain two different used airline tickets in the names of Andrew Kray and James Wodehouse from Honolulu to Miami and back, as well as Miami hotel receipts corresponding to the travel dates on the used airline tickets, handwritten notes indicating amounts owed to Sokolow by various individuals which were consistent with being records of drug transactions, and a personal address book containing, in part, names and phone numbers of individuals suspected of being involved in drug trafficking.

Pending issuance and execution of the search warrant, Sokolow was advised of his constitutional rights and declined to make any statement to the narcotics agents. However, another individual, identified as Frederica Baker, who had in the past been arrested more than twenty times for narcotics and/or prostitution violations, was brought into the office on unrelated charges and identified Sokolow as the person she knew as Andrew who had been buying two to three "paper's" of heroin a day over the past two years from the same supplier she had been dealing with. Sokolow was also overheard making a statement on the telephone that he was in big trouble.

After the apparently unsuccessful search of the brown shoulder bag, narcotics detector dog Donker re-examined the other three pieces of luggage at 9:30 p.m. and alerted to a medium size Louis Vuitton carry-on bag, indicating the presence of a controlled substance inside. Narcotics agents attempted to obtain a second search warrant at that time, but were unable to do so until after the luggage had been examined at 7:45 a.m. the next morning by a second U.S. Customs narcotics detector dog Lady who, under a

different handler, alerted to the same medium size Louis Vuitton bag. This resulted in the issuance and execution of a second federal search warrant which in turn resulted in the seizure of a total of approximately 1,000 grams of cocaine.

Sokolow had been released the night before. Sokolow asked for his luggage and why they were letting him leave when earlier they said he was going to jail for a long time. They stated they could not get another search warrant until the next day since it was getting so late and they would have to get a warrant in the morning.

Based largely on the above information, a third federal search warrant was obtained for a safety deposit box at the Waikiki Branch of the Bank of Hawaii, a search of which produced, *inter alia*, $1,500 in twenty dollar bills.

Sokolow testified at the hearing in this matter and indicated, contrary to DEA reports, he was not nervous while waiting for his plane in the Los Angeles International Airport even though he was in fact carrying cocaine in his luggage.

The defendant alleges that there was insufficient probable cause to detain him and seize his luggage at the airport; that even if probable cause were not required, there was no reasonable suspicion to detain him; that the detention of the luggage for 2½ hours was excessive in time; and that the affidavit in support of the first search warrant was defective in that it failed to adequately specify the qualifications of the narcotics detector dog Donker.

The government responds that neither probable cause nor reasonable suspicion is required when an agent simply approaches and speaks with an individual in a public place; that a reasonable and limited detention is permissible upon a rationale and articulable suspicion of criminal conduct; that there was no custodial interrogation; that, therefore, even if the defendant was improperly detained, there was no taint from that detention extending to the

subsequent validly issued search warrants; that there was probable cause to search the luggage and arrest the defendant based upon the examination of the luggage by the trained narcotics detector dogs; that the detention of the luggage was not unreasonable; and that the searches were pursuant to properly authorized search warrants which were presumptively valid.

After due consideration of the evidence and the case law cited on behalf of both parties, the Court finds the defendant's motion to suppress to be without merit.

The initial stop of the defendant was based on observations recognized as elements of a "drug courier profile," including the fact that the defendant paid for the round-trip airline tickets in cash; the cash consisted of a roll of twenty dollar bills; the tickets were for a very short term trip to Miami, a known source city for drugs; the defendant was traveling under an assumed name; neither the defendant nor his girlfriend had any checked luggage; and that the defendant could produce neither the identification nor his airline tickets. Under *Florida* v. *Royer*, 460 U.S. 491 (1983), these observations constituted a reasonable and articulable basis for the belief that the defendant was a drug courier. The brief detention of the defendant and his luggage for submission to examination by a trained narcotics detector dog was therefore not improper. *United States* v. *Place*, ___ U.S. ___, 103 S.Ct. 2637 (1983).

Subjecting the defendant's luggage to an examination by a trained narcotics detector dog is not a search, and need not be justified by probable cause. *United States* v. *Place, supra*. Nor did the detention of the defendant's luggage for the 13 minutes necessary for such examination violate the guidelines articulated by the Supreme Court in *United States* v. *Place, supra*. In that case, the defendant's luggage was detained in excess of 90 minutes while agents attempted to locate a narcotics detector dog to perform the examination. In the instant case, by contrast, the entire examination was completed within 13 minutes of the initial contact, including the time necessary to transport the luggage from the curbside area to the Customs Office.

Once the narcotics detector dog alerted to the defendant's luggage, there was probable cause to arrest the defendant and detain his luggage for the purposes of obtaining a valid search warrant. Since there was such probable cause to arrest, there is no merit to the defendant's complaint that he was held for 2½ hours before being eventually released. The case of *United States* v. *Place, supra*, cited by the defendant, may be distinguished in that the extended detention of the defendant in that case occurred after the point of initial contact but before the dog alerted to the defendant's luggage, and therefore before the existing of probable cause.

When a search of the first bag produced no visible narcotics but instead other airline tickets in the name of Andrew Kray and records which appeared to be consistent with being drug records, there was a reasonable suspicion to believe the drugs were contained in another sufficient to justify a second examination by the narcotics detector dog. The second alert by the narcotics detector dog was sufficient to detain the luggage until the next morning to obtain a search warrant, at which time a third alert by an independent narcotics detector dog reaffirmed the existence of probable cause to obtain a warrant. *United States* v. *Place, supra.*

Inclusion in the affidavits for the search warrants of the information that the narcotics detector dogs were certified U.S. Customs Service narcotics detector dogs trained to identify the presence of controlled substances, and had done so previously and proven to be reliable in that capacity was sufficient to establish the reliability of the dogs for the purposes of establishing probable cause. *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980).

II. *RECOMMENDATION*

Having reviewed the pleadings and files in this case, having heard argument by counsel, and being fully advised as to both the law and the facts, this Court recommends that the defendant's motion to suppress be denied.

DATED: Honolulu, Hawaii, Nov. 15, 1984.

/s/ Bert S. Tokairin

BERT S. TOKAIRIN
United States Magistrate

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(3)

No. 87-1295

In The

Supreme Court of the United States

October Term 1987

UNITED STATES OF AMERICA,
Petitioner

v.

ANDREW SOKOLOW,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT ANDREW SOKOLOW's BRIEF IN OPPOSITION

ROBERT P. GOLDBERG
1188 Bishop Street
Suite 604
Honolulu, Hawaii 96813
Attorney for Respondent Andrew Sokolow

15 pp

QUESTION PRESENTED

Whether the conformance of an airline passenger to particular characteristics of the "drug courier profile" gave rise to a reasonable suspicion that the passenger was engaged in narcotics trafficking at the time that the passenger was stopped in an airport by drug enforcement agents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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RESPONDENT ANDREW SOKOLOW's BRIEF IN OPPOSITION

STATEMENT

Respondent Andrew Sokolow (Respondent) finds that the Petitioner's statement accurately sets forth the facts material to the consideration of the question presented.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

The decision of the court of appeals in Respondent's case was the result of the court's straightforward application of firmly established precedent set by this Court to the facts before it on the well settled question of federal law regarding the reasonableness of an airport *Terry* stop for narcotics trafficking.

Recognizing and accepting that the "drug courier profile" is a useful tool to aid in the identification of drug traffickers, the court of appeals examined the elements of the drug courier profile relevant to Respondent's case. However, rather than blindly relying on the matching of Respondent's traits with the drug courier profile to find reasonable suspicion, the court of appeals looked carefully to the elements of the profile relevant to Respondent's case to determine whether or not those particular elements of the profile when considered collectively, established a reasonable suspicion, based upon specific and articulable facts, that Respondent, when stopped, was then engaged in narcotics trafficking.

Despite Respondent's conformance with a number of elements of the drug courier profile, the court of appeals concluded that the totality of the circumstances failed to establish a reasonable suspicion that Respondent was engaged in criminal activity at the time that he was stopped and that the Fourth Amendment was therefore violated. By closely examining the totality of the circumstances to determine whether the facts, taken together, raised a reasonable suspicion that justified an investigative stop, the decision reached by the court of appeals is entirely consistent with the four decisions of this Court on the identical question (*United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *Florida v. Rodriguez*, 469 U.S. 1 (1984)) and is further consistent with decisions by other federal courts of appeals on the same

matter. Therefore, the decision of the court of appeals in Respondent's case provides no basis for review by this Court.

i

In *Reid* v. *Georgia*, a federal drug enforcement agent stopped Reid in a public airport on the basis of the agent's belief that Reid matched the drug courier profile. While an examination of the facts showed that Reid's appearance and activity did conform to characteristics of the profile, this Court refused to find that satisfaction of the drug courier profile automatically created a reasonable suspicion that justified an investigative stop. Instead, this Court still required that its standard for investigatory detention be met, namely, that the detention be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal acitivity.

Likewise, in Respondent's case, the court of appeals refused to find that the simple presence of factors matching the drug courier profile automatically created a reasonable suspicion that justified Respondent's stop.[1] Regardless of the presence of a "lengthy list of detailed observations" matching the drug courier profile, the court of appeals believed that "the courts are not relieved of their duty to review the list critically and decide whether each particular observation cited actually contributed something to the 'whole picture' — that is, whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity." App. 8a-9a.

The court of appeals recognized that the drug courier profile serves as a useful investigative tool in the detection of drug traffickers at airports. Because the very nature of the profile is to aid in the identification of persons *presently*

[1] "Courts are not obliged to accept blindly any fact the police can muster when the government fails to establish any credible connection between the fact and a suspicion of ongoing (or recently completed) criminal activity. Nor is the phrase 'drug courier profile' a talismanic label that the government can apply to any given set of facts to obviate consideration of whether reasonable suspicion existed." App. 9a.

carrying drugs,[2] the court of appeals, in analyzing the propriety of detentions based upon elements of the profile, found it useful to distinguish those elements of the profile which are indicative of ongoing criminal activity from those elements which do not. The court believed that the profile elements of evasive action at the airport or the use of an alias during travel are elements which are indicative of ongoing criminal activity and that the presence of these elements may thus provide a suficient basis for detention. Other elements of the profile — destination to and arrival from a "drug source" city, manner of attire, time of flight, presence of carry-on luggage and absence of checked luggage, or position among disembarking passengers — are all profile elements which the court believed describe a cross section of innocent travelers, but also serve to identify the stereotypical appearance or behavior of a drug courier. As such, the court found that the presence of these elements alone may provide a sufficient basis for the further investigation of the passenger to determine whether criminal activity may be afoot; without more, the presence of these elements alone would provide no basis for detention. This Court reached the same conclusion in *Reid*, finding that "circumstances [regarding early arrival from a drug source city and the presence of carry-on bags without checked luggage] describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation . . . could justify a seizure." 448 U.S. at 441.

The methodology adopted by the court of appeals for analyzing airport detentions premised upon elements of the drug courier profile merely provides the court with a useful and orderly means towards arriving at a conclusion regarding the reasonableness of such detentions. While the methodology may involve the separate consideration and analysis of the

[2]This Court has defined the drug courier profile to be "an informally compiled abstract of characteristics thought typical of persons *carrying* illicit drugs." *Mendenhall*, 446 U.S. at 547, n.1. (opinion of Stewart, J.) (emphasis provided).

profile elements relevant to the case in terms of whether the elements are indicative of ongoing criminal activity or whether they describe drug couriers in general, the underlying basis for concluding whether the detention was reasonable is still premised upon this Court's standard formulation in detention cases. In Respondent's case, the court of appeals made clear that regardless of whether the elements of the drug courier profile relevant to a particular case are elements descriptive of ongoing criminal activity or elements descriptive of drug couriers in general, any element or combination of elements relied upon by a law enforcement officer as an articulable fact giving rise to the officer's belief of reasonable suspicion of criminal activity must be supported by a foundation for such belief. The court of appeals stated that the requisite foundation, or what the court chose to call "empirical documentation" or "statistical evidence," is provided by the same type of evidence that this Court required in *Terry*, that is, evidence showing that the officer believed the conduct to be suspicious of criminal activity because of his experience or expertise in law enforcement and his own testimony "about his trained observation of criminal activity." App. 13a, 14a. After such "empirical documentation" is established, the formulation adopted by the court of appeals requires a collective examination of the profile elements to determine the existence of a reasonable suspicion of ongoing criminal activity under the totality of the circumstances.

In adopting its methodology, the court of appeals sought to ensure that "some distinction between investigation and detention . . . remain." App. 14a. The court recognized "that the mosaic that may cause a trained officer of the law to investigate further is not the same mosaic that creates reasonable suspicion to allow a Fourth Amendment seizure" and that "the surmises or hunches that may lead a trained investigator to continue investigation, however, do not serve to allow a seizure." App. 14a.

ii

At the time that drug task force agents stopped Respondent at the Honolulu airport on July 25, 1984, the agents knew that (1) Respondent had just returned from a three-day trip to Miami; (2) Respondent had been nervous when he purchased his airline tickets and had paid $2100 cash for the tickets from a large roll of $20 bills; (3) Respondent and his traveling companion carried four bags and neither had checked any luggage; (4) Respondent wore a black jumpsuit and a lot of gold jewelry; (5) during his return layover at the Los Angeles airport, Respondent appeared nervous and looked all around the waiting area; and (6) Respondent was ticketed under the name Andrew Kray, but had his voice on an answering machine at a telephone subscribed to by a Karl Herman.

The court of appeals appropriately found that the fact that Respondent's voice was on an answering machine for a telephone listed under the name of Karl Herman, who turned out to be Respondent's roommate, did not provide a basis for suspecting that Respondent was using an alias during his trip.

The court further found that the Los Angeles agent's testimony regarding Respondent's nervousness and looking all around the waiting area in the Los Angeles airport was not supported by any further evidence which showed that such nervousness was indicative of criminal activity. The court's conclusion is soundly supported by the fact that the record contains no testimony by the agents, nor any other evidence, which showed that in the experience and trained observation of the particular agents who observed Respondent, that his behavior at the Los Angeles airport gave rise to any belief by the agents that Respondent was engaged in behavior suspicious of criminal activity.[3] Such supporting evidence is precisely the type of "empirical documentation" which the

[3]The conclusion of the court of appeals is in accord with the view held by the Sixth Circuit court of appeals, which has specifically found that nervousness at airports is entirely consistent with innocent behavior and should be entitled to no weight

court of appeals requires in its reasonable suspicion formulation and is the same type of foundational evidence which this Court requires in all instances involving *Terry* detentions.

The lack of the requisite foundational evidence to support a finding that Respondent's behavior at the Los Angeles airport was indicative of ongoing criminal activity was critical to the finding of reasonable suspicion by the court of appeals. Without such evidence, the court was left to logically conclude that the facts present in Respondent's case provided no basis for a reasonable suspicion that Respondent was engaged in criminal activity at the time that he was stopped and that the facts presented only a "vague and inchoate profile" which best served as an investigative tool. App. 20a.

The decision of the court of appeals is in harmony with this Court's four decisions on drug-courier-profile stops. In *Mendenhall*, *Royer*, and *Rodriguez*, the presence of evidence of particular conduct indicative of criminal activity lead this Court to conclude in each case that there was a reasonable suspicion that the person detained was presently engaged in criminal activity. In *Mendenhall*, drug enforcement agents observed that Mendenhall had arrived in the early morning from a drug source city and was the last to deplane. Inside the terminal, she appeared to be very nervous, she completely scanned the entire gate area, walked very slowly toward the baggage area but claimed no baggage, then proceeded to make departure arrangements with a different airlines. Justice Powell's opinion specifically emphasized the fact that Mendenhall's conduct inside the terminal was supported with

in the reasonable suspicion analysis in drug courier profile cases. *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979). See also *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

It should be noted that Petitioner supports its assertion that "numerous courts have treated nervousness as an important factor in determining the existence of reasonable suspicion" with authority wherein the nervous behavior was not observed prior to the stop, but instead was exhibited *after* the defendant was approached and questioned by drug enforcement agents. *United States v. Borys*, 766 F.2d 304, 311-12 (7th Cir. 1985); *United States v. Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982). Petition for Writ of Certiorari at 14, n. 15.

detailed testimony by the observing agent that the agent's training and experience lead him to believe that Mendenhall's behavior was designed to evade detection. 446 U.S. at 564-565.

In *Royer* a drug enforcement agent at the Miami airport approached Royer for questioning upon observing Royer's appearance and mannerisms, his cash purchase of a one-way airline ticket and his mode of checking in his bags. The agent then discovered that Royer's airline ticket and luggage tag bore the name "Holt" while his driver's license carried his correct name. This Court concluded that evidence of the use of an assumed name provided a reasonable suspicion that Royer was engaged in criminal activity. The opinion by Justice White noted, however, that prior to the discovery that Royer was traveling under an assumed name, the factors observed by the agent provided a sufficient basis for investigating Royer, but did not provide a basis for detaining him on the reasonable suspicion that he was engaged in criminal activity. 460 U.S. at 502.

In *Rodriguez*, two plainclothes law enforcement agents observed three men behaving in an unusual manner at the Miami airport ticket counter. The men walked down the concourse carrying their luggage and the agents followed them. One by one, the men sighted the agents and spoke furtively to one another. The agents twice overheard one of the men to urge the other two to "get out of here." Rodriguez then unsuccessfully tried to run from the agents and when confronted, the men gave contradictory statements concerning the identities of two of them.

The court of appeals found that Respondent's case contained none of the factors present in *Mendenhall*, *Royer*, and *Rodrigues*, all of which involved some behavior by the persons detained which supported a reasonable suspicion that they each were engaged in criminal activity when stopped. In particular, the court of appeals aptly emphasized that even though the agents in Respondent's case discovered that Respondent's true name was Sokolow, but that his airline

ticket was issued under the name of Kray and that Respondent, like Royer, was traveling under an assumed name, the discovery of this fact occurred *after* the seizure of Respondent. The court reiterated that the fact that Respondent had his voice on another person's telephone answering machine led to an "unwarranted" belief by the agents prior to the physical seizure of Respondent that he was using an alias and therefore, the evidence obtained after the seizure that Respondent was in fact traveling under an assumed name "[could] not be used as a ground for bringing [Respondent's] case in line with *Royer*." App. 18a.

The court of appeals found that Respondent's case was more like *Reid* where the presence of drug courier profile factors provided, at best, a basis to further investigate, but not to detain. In *Reid*, drug agents observed Reid and another male walking through the airport concourse in a single line of passengers who had disembarked from a drug source city. The men carried similar shoulder bags. Reid was separated from his companion by several people and he occasionally looked backward to his companion. In the main lobby, the men claimed no luggage, they conversed briefly, then together began to depart from the terminal when they were stopped. This Court found that of the evidence relied upon for the stop, only Reid's behavior while walking down the concourse related to his particular conduct. Although the agent believed from this observation that Reid and his companion were attempting to conceal the fact that they were traveling together, this Court concluded that the agent's belief was one "that was more an 'inchoate and unparticularized suspicion or hunch' [quoting *Terry v. Ohio*], than a fair inference in the light of his experience," which was "simply too slender a reed to support the seizure [of the men]." 448 U.S. at 441.

Like *Reid*, the decision of the court of appeals in Respondent's case is further consistent with decisions of other federal courts of appeals which recognize that drug courier profiles, while a useful investigative tool, do not automatically create a reasonable suspicion that will justify an investigative

stop. *See e.g. United States v. Buenaventure-Ariza*, 615 F.2d 29 (2nd Cir. 1980); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Saperstein*, 723 F.2d 1221 (6th Cir. 1983); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

iii

Rather than "outlaw[ing] a large percentage of the 'reasonable suspicion' stops of suspected drug traffickers passing through the airports within the Ninth Circuit,"[4] the decision of the court of appeals in Respondent's case allows for the continued use of the drug courier profile in justifying reasonable suspicion. The decision merely reinforces the well established principles set forth by this Court and by other federal courts of appeals that any seizure of a person premised upon factors of the profile must be supported by a reasonable suspicion, based upon specific and articulable facts, that the person stopped is presently engaged in narcotics trafficking. As such, the decision of the court of appeals provides no basis for review by this Court.

[4]Petition for Writ of Certiorari at 11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT P. GOLDBERG
Attorney for Respondent
Andrew Sokolow

No. 87-1293

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM AND REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1295

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM AND REPLY MEMORANDUM FOR THE UNITED STATES

I

Before addressing the arguments made in respondent's opposition, we wish to point out a development in this case that we learned about only after the petition had been filed.

As we explained in the petition (at 2 & n.1), the court of appeals denied our rehearing petition on November 4, 1987. It did not, however, act on our suggestion for rehearing en banc at that time. On the same date, however, the court of appeals issued a new opinion that substantially changed the rationale for the court's decision. Accordingly, on November 18, 1987, we filed a supplemental rehearing petition and suggestion for rehearing en banc. At the same time, because, under Rule 20.4 of the Rules of this Court, the time within which to file a petition for a writ of certiorari runs from the date of the denial of a rehearing petition, we sought an extension of time from this Court

within which to file a petition for a writ of certiorari. On December 30, 1987, Justice O'Connor entered an order extending the time within which to file a petition for a writ of certiorari until February 2, 1988. Because our petition for rehearing had been denied 90 days earlier, we were compelled to file our certiorari petition on that date, even though the court of appeals had not yet acted on our suggestion for rehearing en banc.

We later learned that on December 30, 1987, the court of appeals entered an order in which it directed the clerk to file the supplemental petition for rehearing and suggestion for rehearing en banc and in which the court treated that pleading as a new petition for rehearing. App., *infra*, 1a. Unfortunately, the court of appeals did not serve counsel of record for the United States with a copy of the court of appeals' December 30 order. We were therefore unaware of that order until we were informed about it by the Clerk of the Ninth Circuit on March 3, 1988. As of the date of the filing of this memorandum, the court of appeals still has not acted on our supplemental rehearing petition or on our suggestion for rehearing en banc.

The court of appeals' December 30 order raises the question whether the certiorari petition in this case is ripe for consideration by this Court.[1] Rule 20.4 of the Rules of this Court provides that the time within which to file a certiorari petition commences when a rehearing petition is denied, which occurred in this case on November 4, 1987. By ordering that the government's supplemental rehearing

[1] The ripeness question is prudential, not jurisdictional. This Court may grant a petition for a writ of certiorari in any case that is in a court of appeals, even if the court of appeals' judgment is not final. See, *e.g.*, *Barefoot* v. *Estelle*, cert. granted, 459 U.S. 1169 (treating an application for a stay as a petition for a writ of certiorari before judgment and granting the petition), 463 U.S. 880, 887 (1983).

petition be treated as a new petition for rehearing, however, the court of appeals' December 30, 1987, order may have had the effect of suspending the finality of that court's November 4, 1987, order—assuming, of course, that the government's supplemental rehearing petition will hereafter be considered on its merits. Compare *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), with *Bowman* v. *Loperena*, 311 U.S. 262 (1940); see R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.3, at 312-313 (6th ed. 1986).

We believe that the best way to resolve this matter is for the Court to hold the petition in this case until the court of appeals has finally acted on the government's supplemental rehearing petition. If the court of appeals grants that petition or decides to rehear the case en banc, review by this Court may be unnecessary, at least at present. On the other hand, if the court of appeals denies the government's supplemental rehearing petition, the certiorari petition in this case will clearly be ripe for review. Holding the certiorari petition until the court of appeals finally acts on our supplemental rehearing petition will not prejudice respondent, because he is free on bail. We will, of course, inform the Court of any future action by the court of appeals on the government's supplemental rehearing petition and suggestion for rehearing en banc.

II

In our petition, we argued that review is warranted because the novel two-part test adopted by the court of appeals for assessing reasonable suspicion in the airport setting is contrary to (1) this Court's decision in *Florida* v. *Royer*, 460 U.S. 491 (1983); (2) the approach followed by other courts of appeals in analyzing airport stop cases; and (3) the Fourth Amendment principles this Court has con-

sistently endorsed since *Terry* v. *Ohio*, 392 U.S. 1 (1968), in the context of reasonable suspicion stops. Respondent does not deny that the court below adopted a two-part test for assessing *Terry* stops of suspected narcotics traffickers in the airport context, nor does he deny that the factors on which the agents relied on this case are ones on which other courts of appeals commonly rely in upholding *Terry* stops of suspected narcotics traffickers in that setting (Pet. 11-14). Instead, he argues (Br. in Opp. 4) that the court of appeals' two-part test is a "useful and orderly means" of analyzing airport stops, and that the test is consistent with this Court's decisions. That dispute should be resolved after full briefing on the merits. At present, only a few points need be made.

Respondent apparently agrees with us (see Pet. 15-16) that a court must consider the totality of the circumstances in determining whether there was reasonable suspicion. He argues (Br. in Opp. 2), however, that the court of appeals' test allows all the facts to be considered, and that the court of appeals closely examined all the facts in this case. That argument does not fairly reflect what the court of appeals actually did. In its second amended opinion, the court of appeals refused to consider much of the evidence known to the narcotics officers—such as respondent's nervous $2100 cash purchase of open-return, round-trip airline tickets, and his 20-hour trip for the purpose of spending only two days in Miami, a major source of cocaine. See Pet. App. 20a. The court refused to consider those factors even though in its first opinion the court regarded the cash purchase by itself to be "close" to establishing reasonable suspicion. *Id.* at 42a.[2] The court of appeals held that such evidence is "irrelevant" (*id.* at 19a) unless an officer can

[2] Respondent also studiously ignores his cash purchase in arguing that there was no reasonable suspicion in this case.

show, through "[e]mpirical documentation," that "a pattern of behavior, otherwise explicable as innocent behavior, does not exist in a significant number of innocent people." *Id.* at 13a. The two-part test adopted by the court below therefore does not require a close examination of all the facts.

Respondent also apparently agrees with us (see Pet. 16, 20-22) that the evidence must be considered in light of the inferences that a trained and experienced officer would draw. In his view (Br. in Opp. 5), the " 'empirical documentation' " or " 'statistical evidence' " required by the court of appeals to substantiate many of the facts on which officers rely can be met by "the same type of evidence that this Court required in *Terry*, that is, evidence showing that the officer believed the conduct to be suspicious or criminal activity because of his experience or expertise in law enforcement and his own testimony 'about his trained observation of criminal activity.' " We do not share respondent's optimism. The court of appeals rejected the eminently reasonable judgment of officers with 25 years of law enforcement experience that respondent was using an alias. The court did so by relying on the supposition that "it is not uncommon for persons with different last names to share a common residence and telephone," and that it is not unusual for a person "to dictate prerecorded messages on the answering machine even though his or her name is not listed with the phone company as the subscriber." Pet. App. 18a. Similarly, the court of appeals gave no weight to the officers' judgment that respondent was nervous, because the court hypothesized that he may have been worried about a "mid-air collision" or "delays." *Id.* at 20a (citing *Newsweek*, July 27, 1987, at 20). The decision below therefore offers little basis for confidence that an officer's experience will

count for much under the court of appeals' new two-part reasonable suspicion test.

We completely part company with respondent on the degree of certitude that an officer must have that criminal activity is afoot before he may stop a suspect for questioning. Respondent agrees with the court of appeals (Br. in Opp. 4; Pet. App. 12a) that the facts known to the officers did not establish reasonable suspicion because each fact could also describe a significant number of innocent travelers. But this Court's decisions show that it is incorrect to disregard evidence that is equally consistent with innocent and illegal conduct when determining if reasonable suspicion exists. See Pet. 15 & n.16. In fact, the probable cause standard for an arrest does not require that it be more likely than not that a person has committed a crime; only a "fair probability" of criminality is necessary. *Illinois* v. *Gates*, 462 U.S. 213, 235, 238, 243-244 n.13 (1983).[3] Because the quantum of suspicion required for a *Terry* stop is less than probable cause, it follows that the evidence supporting reasonable suspicion need not establish the commission of a crime even half the time.[4] More importantly, when *all* the facts in this case are con-

[3] Even the reasonable doubt standard applicable at trial does not require a court to find that the proof is inconsistent with some conceivable hypothesis of innocence. *Jackson* v. *Virginia*, 443 U.S. 307, 317 n.9, 326 (1979); *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

[4] The courts of appeals have recognized that it is the rare case in which an officer observes behavior consistent only with guilt and incapable of an innocent interpretation. *United States* v. *Poitier*, 818 F.2d 679, 683 n.2 (8th Cir. 1987); *United States* v. *Rickus*, 737 F.2d 360, 365 (3d Cir. 1984); *United States* v. *Black*, 675 F.2d 129, 137 (7th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); *United States* v. *Viegas*, 639 F.2d 42, 45 (1st Cir.), cert. denied, 451 U.S. 970 (1981); *United States* v. *Price*, 599 F.2d 494, 502 (2d Cir. 1979).

sidered together, it is highly unlikely that they would describe an innocent traveler.

Finally, respondent is mistaken in contending (Br. in Opp. 3-4, 9) that the court of appeals' ruling is consistent with *Reid* v. *Georgia*, 448 U.S. 438 (1980). In *Reid*, when the narcotics officers stopped the defendant, they knew that (1) he and a companion had arrived in Atlanta from Fort Lauderdale, a source city for cocaine; (2) they arrived early in the morning, when law enforcement activity is light; (3) both persons carried only shoulder bags; and (4) the defendant and his companion appeared to be trying to conceal the fact that they were traveling together. The Court held that the first three facts were insufficient since they "describe a vary large category of presumably innocent travelers" (*id.* at 441). The Court also found that the last fact was insufficient on the facts of that case to support reasonable suspicion. The Court did not hold that facts describing innocent travelers are never relevant to the reasonable suspicion determination. On the contrary, the Court expressly recognized that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Ibid.* The Court simply conc' ded that "this is not such a case." *Ibid. Reid* therefore does not support the court of appeals' conclusion that before an officer may make a *Terry* stop he must prove that the facts known to him do not also fit the description of an innocent traveler.

CONCLUSION

The petition for a writ of certiorari should be held until the court of appeals has finally disposed of the government's supplemental petition for rehearing. If the supplemental petition for rehearing is denied, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 84-002200-02-SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

[Filed Dec. 30, 1987]

ORDER

Before: FERGUSON, NORRIS and WIGGINS, Circuit Judges.

The clerk is directed to file the supplemental petition for rehearing with suggestion for rehearing en banc which was received November 18, 1987.

The petition when filed shall be deemed a new petition for rehearing with suggestion for rehearing en banc.

The clerk is directed to forward copies of the petition to all active judges of this Circuit.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/80097

(5)

No. 87-1295

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED FEBRUARY 2, 1988
CERTIORARI GRANTED JUNE 6, 1988

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1295

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

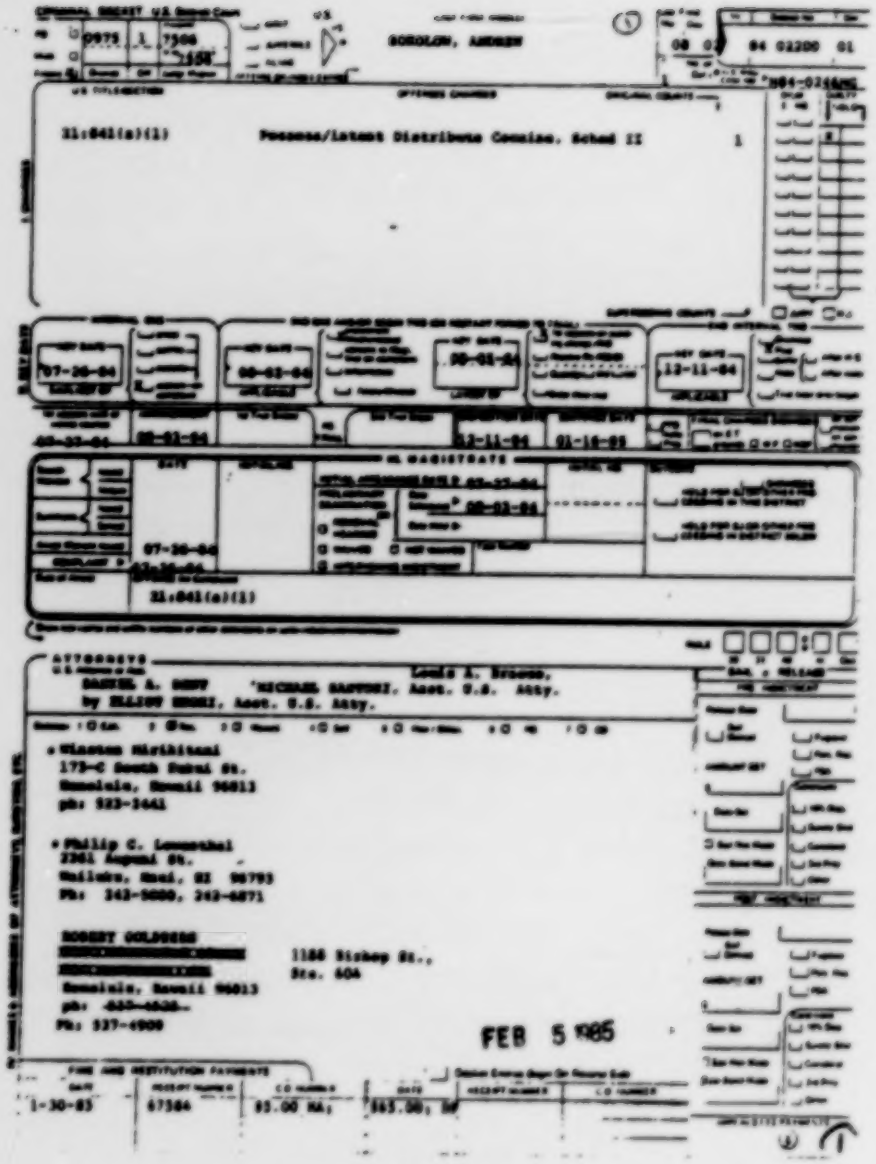
JOINT APPENDIX

TABLE OF CONTENTS*

* With one exception reprinted below, the opinions and orders of the court of appeals and the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

Page

CONTENTS – Continued



Date	(Document) No.	Proceedings
1984		
Jul 25		Affidavit of Search Warrant – One Brown Shoulder Bag with black pockets on each end, initials "BDH", measuring 14x12½x8 Affidavit of John D. McCarthy (M84-0246MG)
		Search Warrant issued
Jul 26		COMPLAINT, Affidavit of John D. McCarthy, Task Force Agent
		Warrant of Arrest, issued: Bail set at $75,000. *GEDAN*
Aug. 2	1	*EP:* INDICTMENT – PS ordered & issued, retn 8-3-84 @ 2:00 p.m. (T) (YI) *TOKAIRIN*
Oct. 10	15	Notice of Motion – 10-26-84 @ 2:00 p.m. (T) – Motion to Suppress Evidence; Memorandum in Support of Motion to Suppress Evidence *10-10-84*
Oct. 25	17	Government's Memorandum in Opposition to Defendant's Motion to Suppress Evidence
Oct. 29		*EP:* PT & M/Suppress: PT conference pursuant to Rule 325, Deft witness: Janet Norian, CST, Andrew Sokolow, CST. USA & Deft's atty to stipulate to facts and to items to be suppressed. Further hrng on M/Suppress set

Date	(Document) No.	Proceedings
		for 10-30-84 @ 11:00 a.m. (T). Santoki to prepare order regarding PT Conference. (DO) *TOKAIRIN*
Oct. 30	18	*EP:* Further Hrng on M/Suppress – "M/Quash Subpoena" filed in open court @ 11:13 a.m. Court granted the M/Quash Subpoena. Govt witness Joseph Brostowski: CST. Santoki & Goldberg to file closing memos regarding stipulated facts as to M/Suppress & submit to Magis Tokairin. (DO) *TOKAIRIN*
Nov. 1	19	Stipulated Facts
		EP: Further Hrng M/Suppress: DENIED. Santoki to prepare ORDER (DO) *TOKAIRIN*
Nov. 6	20	*EP:* M/Withdrawal of Not Guilty Plea & to Plea Anew – "Memorandum of Plea Agreement" filed. Hearing contd until 12-10-84 @ 2:00 p.m. (K). Ordered that the pd beginning 11-6-84 to and including 12-10-84 be excluded from the computation of the Speedy Trial Requirements. Court will rule on the M/Withdrawal of Not Guilty plea etc after the disposition of the M/Suppress. (DO) *KING*

Date	(Document) No.	Proceedings
Nov. 15	22	Magistrate's Report and Reconmmendation [*sic*] Denying Defendant's Motion to Suppress *TOKAIRIN* CC: Goldberg, Santoki
Nov. 26	23	Defendant's Written Objections to Magistrates Report and Recommendation Denying Defendant's Motion to Suppress Evidence *Taken Under Advisement*—referred to KING
	25	Government's Memorandum in Opposition to Defendant's Objections to Magistrate's Report and Recommendation Denying Defendant's Motion to Suppress
Dec. 11		*EP:* M/Withdrawal of Not Guilty Plea and to Plea Anew & Appeal from the Magistrate. Magistrate order: Affirmed. Deft sworn. Adv. of rights. Questioned. M/WD of Not Guilty Plea & to Plea Anew: Granted. Conditional Guilty plea entered. Referred for presentence investigation & report. SENTENCE: 01-15-85 @ 2:00 p.m. (K) (Stacy Reinier/ Knipes) KING
Dec. 14	29	NOTICE—SENTENCE contd to 01-16-85 @ 9:30 a.m. (K)

Date	(Document) No.	Proceedings
1985		
Jan. 16		*EP:* Sentencing: Adj 5 yrs impr, with 3 yrs SPT purs to 18:4205(b)(2) MITTIMUS stayed to 01-30-85 @ 10:00 a.m. Bond contd. In the event that a Notice of Appeal is filed, the present bond with the following additional conditions will cont pending appeal; 1. That the deft continue with the programs outlined in the Presentence Report 2. That the deft report to the Probation Office at such time as det by the Probation Office. (TC) *KING*
	30	JUDGMENT & COMMITMENT *KING*
Jan. 24	31	NOTICE OF APPEAL (By Defendant)
Feb. 12	34	ORDER DENYING Defendant's Motion to Suppress Evidence KING cc: Santoki, Goldberg
1986		
Aug. 4	44	AMENDED ORDER 9th CCA—Submission of this case is hereby vacated. Case is remanded for a period of 90 days with limited purpose of making the findings.

Date	(Document) No.	Proceedings
		This panel shall retain jurisdiction over the appeal following remand when the case will be resubmitted without further order from this Court. cc: USM, USPO, Goldberg, Judge King's clerk, Enoki/ Santoki Judge King
Aug. 14		*EP:* Conference: Discussion held regarding Conference on Remand – Hearing Responding to Order of 9th Circuit set for Thursday, 09-22-86 at 2:00 (K) (TC) *KING*
Sep. 18	45	Government's Statement of Facts and Proposed Findings Upon Remand cc: Judge King
Sept. 22		*EP:* Evidentiary Hearing on Remand from the Ninth Circuit for the District Court to Make Findings on Four Issues. Govt's witnesses: John McCarthy and Richard Kempshall, CST. Deft Andrew Sokolow, CST on his own behalf. The Court finds that: 1) The deft reasonably believed that he was not free to leave at the initial curbside stop; 2) That the govt curbside stop was supported by a founded

Date	(Document) No.	Proceedings
		suspicion that the deft was engaged in criminal activity 3) That the deft did not consent to accompany the officers into the DEA office; and 4) That the detention of the deft in the DEA office constituted the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. (ERS – Jon Okimoto) *KING*
Sept. 23	46	Findings Pursuant To Remand ORDER *KING* cc: Santoki, Goldberg, 9CCA (thru AJR)
1988		
June 1	48	JUDGMENT – 9CCA – Judgment of District Court: REVERSED & REMANDED [Filed & entered 9CCA 01-28-87] cc: USA, Goldberg, USPO, USM, Judge King, Ctrm Deputy to Judge King

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1021

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

[Filed Aug. 2, 1984]

Judge SAMUEL P. KING

DATE	FILINGS–PROCEEDINGBS
1985	
JULY 12	ARGUED & SUBMITTED BEFORE: FERGUSON, NORRIS & WIGGINS, CJJ.cmk
1986	
June 06	Filed Order (FERGUSON, NORRIS & WIGGINS, CJJ) Both parties are ordered to submit supplemental briefs of no more than 20 pages on the question of whether the detention of Sokolow in the DEA airport office constituted a "de facto" arrest, as distinguished from an investigative stop. The briefs shall be filed no later than 14 days after the date of this order. The case shall stand resubmitted upon the filing of the supplemental briefs. -ot-

DATE	FILINGS–PROCEEDINGS
July 25	Filed Order (FERGUSON, NORRIS & WIGGINS, CJJ) the case is remanded for a period of 90 days with the limited purpse [*sic*] of making the following findings: 1. Whether at the initial curbside stop, Sokolow reasonably believed that he was not free to leave. 2. Whether the initial curbside stop supported by a founded suspicion that Sokolow was engaged in criminal activity. 3. Whether Sokolow consented to acompany [*sic*] the officers into the DEA office. 4. Whether the detention of Sokolow in the DEA office constituted "the latest [*sic*] intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."] This panel shall retain jurisdiction over the appeal following remand. tsp
1986	
Jul 31	Filed Amended Order (FERGUSON, NORRIS & WIGGINS, CJJ) Submission of this case is hereby vacated. The case is remande[d] for a period of 90 days with the limited purpose of making the following fin[d]ings: (SEE CASE FILE) -ot-
OCT 2	Rec'd as of 9/29 copy of dc order re: remand per order of 7/25. (PANEL)
1987	
JAN 28	ORDERED OPINION (NORRIS) FILED & JUDG. TO BE FILED & ENTD.
JAN 28	FILED OPINION–REVERSED & REMANDED. (WIGGINS, DISSENTING)

DATE	FILINGS – PROCEEEDINGS
JAN 28	FILED AND ENTERED JUDGMENT -ot-
Mar 10	Filed Order (FERGUSON, NORRIS & WIGGINS) The opinion is ordered amended in the following respects: On page 9 of the slip opinion, delete the para[g]raph beginning "Nor is it in any way suspicious. . . ." In its stead, insert the following paragraph: SEE CASE FILE. -ot-
Mar 10	Filed Amended Opinion – reversed & remanded (Wiggins, dissenting) SEE CASE FILE. -ot-
Nov 04	Filed Second Amended Opinion – reversed & remanded (WIGGINS, dissenting) SEE CASE FILE. -ot-
1988	
May 11	Filed order (FERGUSON, NORRIS, WIGGINS, CJJ) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. tsp
May 27	MANDATE ISSUED

SEARCH WARRANT ON WRITTEN AFFIDAVIT

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Docket No. 84-0246MG

UNITED STATES OF AMERICA

v.

ONE BROWN SHOULDER BAG WITH BLACK POCKETS ON EACH END, INITIALS "BDH", MEASURING 14" × 12½" × 8"

To: any duly authorized federal law enforcement officer

Affidavi(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the premises known as) one brown shoulder bag with black pockets on each end and black carrying strap, with the initials "BDH" engraved in gold on the bag, measuring 14" × 12½" × 8" in the District of Hawaii there is now being concealed certain property, namely controlled substances held in violation of Title 21, United States Code, Sections 841(a)(1) and 844.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
JUL 25, 1984
at 8 o'clock and 15 min.
WALTER A.Y.H. CHINN, CLERK

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before August 4, 1984 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to U.S. Magistrate as required by law.

Name of Affiant
John D. McCarthy
Signature of Judge or US Magistrate
Joseph M. Gedan
Date/Time issued
7-25-84 8:15 p.m.

*If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable cause therefor.

AFFIDAVIT FOR SEARCH WARRANT

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Docket No. 84-0246MG

UNITED STATES OF AMERICA

v.

ONE BROWN SHOULDER BAG WITH BLACK POCKETS ON EACH END, INITIALS "BDH", MEASURING 14" × 12½" × 8"

Name and address of Judge or U.S. Magistrate
Hon. Joseph M. Gedan
U.S. Courthouse
300 Ala Moana Blvd.
Honolulu, Hawaii 96850

The undersigned being duly sworn deposes and says: That there is reason to believe that on the premises known as Hawaii

one brown shoulder bag with black pockets on each end and black carrying strap, with the initials "BDH" engraved in gold on the bag, measuring 14" × 12½" × 8"

[Form printed line illegible]

controlled substances held in violation of Title 21, United States Code, Sections 841(a)(1) and 844.

Affiant alleges the following grounds for search and seizure[2]

See attached affidavit which is incorporated as part of this affidavit for search warrant

Affiant states the following facts establishing the ongoing grounds for issuance of a Search Warrant

see attached affidavit

Signature of Affiant
John D. McCarthy
Official Title, if any
Task Force Agent
Date
July 25, 1984
Judge or US Magistrate
Joseph M. Gedan

---

[1]United States Judge or Judge of a State Court of Record.

[2]If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure 41(c), show reasonable cause therefor.

AFFIDAVIT OF JOHN McCARTHY

JOHN McCARTHY, being duly sworn under oath deposes and says:

1. I am an officer with the Honolulu Police Department, have been so employed for eight years, have been assigned to the Airport Task Force at the Honolulu International Airport since 1983, and am experienced in the enforcement of state and federal drug laws.

2. On July 22, 1984, I received the following information from John Birt, a United Airlines Ticket Agent at the Honolulu International Airport:

a. On July 22, 1984, Birt sold two roundtrip tickets on United Airlines to Miami, Florida via Chicago, Illinois, departure being on July 22, 1984, with an open return.

b. The tickets were sold to a male identifying himself as "Andrew Kray," in the names of "Andrew Kray" and "Janet Norian"; with the male paying for the $2100 worth of tickets with a stack of twenty-dollar bills from which Birt took $2100 and noted that the amount left was approximately equal to the amount taken.

c. The individual furnished Birt with a callback phone number of (808) 926-3481.

d. Birt described the individual as caucasion male, approximately 25 years old, small build, 5'6", 130 pounds, wearing black clothing and a large amount of gold jewelry.

e. The individual was with a caucasian female, tall, thin, wearing a red blouse and blue slacks.

3. Hawaiian Telephone records indicate that (808) 926-3481 is subscribed to by Karl Herman of 348-A Royal Hawaiian Avenue, Honolulu, Hawaii.

4. On July 24, 1981, Birt listened to the recorded message I received after dialing (808) 926-3481 and identified the voice as being that of the same male individual

that bought the airline ticket in the name of "Andrew Kray."

5. According to United Airlines records I received on July 24, 1981, two reservations from Miami to Honolulu were made, with arrival in Honolulu on Flight 5, United Airlines on July 25, 1981, in the names of "Andrew Kray" and "Janet Norian."

6. Special Agent Mary Turner of the Drug Enforcement Administration, Los Angeles, informed me on July 25, 1984, that she had seen two individuals fitting the descriptions of the two persons flying under the names of "Kray" and "Norian" board United Airlines Flight 5 in Los Angeles to Honolulu on July 25, 1984, with the male wearing a black jump suit and a large amount of gold jewelry; the female was not dressed as previously described.

7. I was informed by Special Agent Richard Kempshall of the Drug Enforcement Administration at approximately 7:00 p.m. on July 25, 1984, that he observed two persons fitting the descriptions of the two individuals travelling under the names of "Kray" and "Norian" deplane from United Airlines Flight 5 at Honolulu International Airport, with the male carrying two pieces of carryon luggage as was the female. Kempshall further informed me that:

a. He approached the couple as they were in the roadway outside the baggage claim area on the ground floor at the Airport at approximately 6:41 p.m.

b. The male stated he had no identification, was not in possession of his airline ticket, flew to Miami using his mother's maiden name of "Kray," and had not made the reservations for the flight himself.

c. The couple and their carryon luggage were taken to the Drug Enforcement Administration Airport office where the luggage was turned over to United States Customs Service Dog Handler Jerry Tomaino for examination by narcotics detector dog "Donker."

d. At approximately 6:54 p.m., Tomaino informed Kempshall that Donker had examined all four pieces of carryon luggage and had alerted to one of the pieces carried by the male, indicating the presence of controlled substances in that piece of luggage, and had not alerted to the other three.

e. The piece of luggage alerted to is a brown shoulder bag with black pockets on each end and black carrying strap, with the initials "BDH" engraved in gold on the bag, which measures approximately 14" × 12½" × 8".

8. Tomaino has previously informed me that Donker, serial number C-166, is a certified United States Customs Service narcotic detector dog trained to identify the presence of controlled substances, and Donker has correctly identified the presence of controlled substances on hundreds of prior occasions and has proven to be a reliable narcotics detector dog.

9. Based on the above, I am informed and believe that there is probable cause to believe that there are controlled substances held in violation of Title 21, United States Code, Sections 841(a)(1) and 844 in the bag described in paragraph 7e, above.

Further affiant sayeth naught.

/s/ JOHN D. McCARTHY
JOHN D. McCARTHY

Subscribed and sworn to before me
this 25th day of July, 1984.

JOSEPH M. GEDAN
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF HAWAII

ROBERT P. GOLDBERG #1915

CR. NO. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF

VS.

ANDREW SOKOLOW, DEFENDANT

STIPULATED FACTS

Comes now plaintiff United States of America and defendant Andrew Sokolow through their respective counsel to stipulate to the following facts with respect to the defendant's motion to suppress:

On July 22, 1984, Honolulu Police Department and Airport Task Force Officer John McCarthy received information from a United Airlines ticket agent named John Birt indicating on that date Birt sold two round trip tickets in the names of Andrew Kray and Janet Norian from Honolulu to Miami, Florida, departing on July 22, and with an open return. The tickets were paid for in cash by the individual identifying himself as Andrew Kray, with Kray giving Birt a stack of $20 bills from which Birt took $2,100 and returned the remainder to Kray.

These facts were reported to the Drug Enforcement Administration who upon calling the telephone number given by Sokolow determined that said number was subscribed to a Karl Herman at 348-A Royal Hawaiian Avenue,

Ho lulu, Hawaii. Said address in fact being the residence of S olow and Karl Herman.

O uly 24, 1984, Agent McCarthy learned that return reserv tions from Miami to Honolulu had been made in the names of Andrew Kray and Janet Norian, with arrival in Honolulu on July 25, 1984. Drug Enforcement agents in the city of Los Angeles, California, confirmed that Kray and Norian were aboard the flight to Honolulu.

At approximately 6:27 p.m. on July 25, 1984, Andrew Kray and Janet Norian were observed arriving at the Honolulu Airport with four carry-on bags. Kray and Norian proceeded directly to the street level and attempted to look for a taxi.

Agent Richard Kempshall approached the couple as they were in the roadway outside the baggage claim area on the ground floor at the Airport at approximately 6:41 p.m.

Kray stated that he had no identification, was not in possession of his airline ticket, flew to Miami using his mother's maiden name of "Kray" and had not made the reservations for the flight himself.

The couple and their carryon luggage were taken to the Drug Enforcement Administration Airport office where the luggage was turned over to the United States Customs Service Dog Handler Jerry Tomaino for examination by narcotics detector dog "Donker".

At approximately 6:54 p.m. on July 25, 1984, the luggage was examined by narcotics detector dog Donker. Donker alerted to a brown shoulder bag with black pockets, indication [*sic*] the presence of narcotics therein.

Based on this information, narcotics agents arrested Sokolow (Kray) and obtained a federal search warrant for the brown shoulder bag. The affidavit in support of the search warrant included the information that Donker was

a certified U.S. Customs Service narcotic detector dog trained to identify the presence of controlled substances, and had done so previously and proven to be reliable in that capacity. The bag was searched pursuant to the warrant at approximately 8:55 p.m. on July 25, 1984, and did not appear to contain any narcotics. The brown shoulder bag did contain two different used airline tickets in the names of Andrew Kray and James Wodehouse from Honolulu to Miami and back, as well as Miami hotel receipts corresponding to the travel dates on the used airline tickets.

Pending issuance and execution of the search warrant, Sokolow was advised of his constitutional rights and declined to make any statements to the narcotics agents. However, Sokolow was also overheard making a state ment on telephone that he was in big trouble.

Approximately a half hour after opening up the parties['] brown bag the agents informed Janet Norian that she could go but continued to hold Sokolow. The baggage that Janet Norian was carrying was not returned.

After the apparent unsuccessful search of the brown shoulder bag, narcotics detector dog Donker reexamined the other three pieces of luggage, at 9:30 p.m. and alerted to a medium sized Louis Vuitton carry-on bag, indicating the presence of a controlled substance inside. Narcotics agents attempted to obtain a second search warrant at that time, but were unable to do so until after the luggage had been examined at 7:45 a.m. the next morning by a second U.S. Customs narcotics detector dog Lady, who, under a different handler, alerted to the same medium sized Louis Vuitton bag. This resulted in the issuance and execution of a second federal search warrant which in turn resulted in the seizure of a total of approximately 1,000 grams of cocaine.

Sokolow had been released the night before. Sokolow asked for his luggage and why they were letting him leave when earlier they said he was going to go to jail for a long time. They stated they could not get another search warrant until the next day since it was getting so late and they would have to get a warrant in the morning.

Based largely upon the above information, a third federal search warrant was obtained for a safety deposit box at the Waikiki branch of the Bank of Hawaii, a search of which produced, *inter alia*, $1,500 in twenty dollar bills.

This stipulation is intended to supplement and not contradict evidence presented in court at the hearing on this matter and affidavits submitted by the plaintiff at the hearing.

DATED: November 1, 1984, at Honolulu, Hawaii.

/s/ ROBERT P. GOLDBERG
ROBERT P. GOLDBERG
Attorney for Defendant
Andrew Sokolow

DANIEL A. BENT
United States Attorney
District of Hawaii

By /s/ MICHAEL A. SANTOKI
MICHAEL A. SANTOKI
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

APPROVED AND SO ORDERED:
BERT S. TOKAIRIN
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CRIMINAL NO. 84-2200

UNITED STATES OF AMERICA, PLAINTIFF

VS

ANDREW SOKOLOW, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Monday, October 29, 1984, at 10:30 A.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE BERT S. TOKAIRIN, U.S. Magistrate.

Appearances:

MICHAEL SANTOKI, ESQ.
Assistant U.S. Attorney
Room C-242, U.S. Courthouse
300 Ala Moana Boulevard
Honolulu, Hawaii

Appearing for the Plaintiff;

ROBERT P. GOLDBERG, ESQ.
130 Merchant Street
Suit 2020
Honolulu, Hawaii

Appearing for the Defendant.

* * *

THE WITNESS: Janet Norian, N-o-r-i-a-n.

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Janet, back in July, July 22, 1984, did you take a vacation to Miami, Florida?
A Yes.
Q Who did you go with?
A Andrew Sokolow.
Q Do you see him in the courtroom?
A Yes.
Q Point to him, please.
(Witness pointed to the defendant)
[3] MR. GOLDBERG: May the record reflect the witness has identified the defendant Sokolow?
THE COURT: Yes. The record will so show.
Q On July 22nd, what occurred on that day? You went to the airport?
A Yes; we went to the airport together.
Q And how many pieces of baggage did you have with you?
A I had one bag and a shoulder bag.
Q And what did he have with him?
A One bag and a shoulder bag?
Q And did you check any luggage in at the airport?
A No, we didn't.
Q And then you flew to Miami, is that correct?
A That's right.
Q Now, at the time, you were living with Andrew Sokolow, is that correct?
A Yes.
Q. And that's at 348-A Royal Hawaiian Avenue?
A Yes.

Q Did he have any other roommates there?
A Yes, he had one.
Q What's his roommate's name?
A Karl Herman.
Q Is Karl Herman still his roommate?
A Yes.
[4] Q. What's his telephone number there where you and Mr. Sokolow were residing?
A I can't remember.
MR. SANTOKI: That's part of what we will stipulate to.
MR. GOLDBERG: Thank you.
MR. SANTOKI: If that will help.
THE COURT: What is the number?
MR. GOLDBERG: The telephone number is stated in the affidavit of the DEA agent. It's 926-3481, which as stated in the affidavit attached to the search warrant is in the name of a Karl Herman at said address, that being the telephone number that Mr. Sokolow had given to the airlines as confirmation.
Q Okay. Now, on July 22nd, you and Andrew Sokolow returned to Honolulu, is that correct?
A Yes.
Q You left Miami.
A Yes.
Q And where did you fly to?
A Denver first.
Q How long were you in Denver?
A For about an hour.
Q And then from Denver where did you fly to?
A To Los Angeles.
[5] Q What airlines was that on?
A I can't remember.
Q Okay. Now, when you landed in Los Angeles, what

did you do when you got off the airplane? Had you checked in any baggage?
A Yes. I checked what I was carrying.
Q Okay. You didn't give any bags to the airlines.
A No.
Q You kept it with you.
A Yes.
Q And Andy kept his bags with him also?
A Yes.
Q And then you flew from Denver to Los Angeles?
A Yes.
Q Okay. And, when you got off the plane in Los Angeles, what did you do?
A We got off the flight and changed different flights.
Q So, when you got off the first flight. . .
A Yes.
Q . . . in Los Angeles, did you just sit there and wait for the next plane?
A We had to change terminals. We walked quite a ways to the next terminal.
Q Okay. And, when you got to the next terminal, what did you do?
[6] A We sat down for a little while, and then I got up and went to a shop for a drink and came back.
Q And what was Andy doing during this time, Mr. Sokolow?
A He was lying on the lounge, relaxing.
Q He was lying down on the chairs?
A Yes. It was a lounge type chair. You can sit like two or three people.
Q So he was lying across three different chairs then.
A No. It was one lounge.
Q One couch.
A Yes, one couch.

Q And how long did you have to wait for the next plane to leave?

A About an hour.

Q During this one-hour period, what did you do?

A I sat down next to Andy and picked up a magazine and read my magazine.

Q What magazine were you reading, do you remember?

A No, I can't remember.

Q Was it a magazine that was there already?

A No. It was one that I had before, that I had carried on the flight.

Q Do you remember where you got that magazine?

A No.

Q Did you have it with you in Miami?

[7] A I can't remember.

Q And, as you were reading your magazine, what did you do? Did you get up and do anything else?

A No, I didn't. I just sat there and waited.

Q And how long did you wait?

A For about half an hour, maybe longer.

Q Okay. And then what happened. What did Andy do during this one-half hour?

A He was right next to me. He was reading a magazine and waiting for the plane.

Q Okay. And then what happened next?

A They called us and we boarded. We both got on the flight together.

Q Did they call you individually by name?

A No. They called by numbers.

Q And they called your number?

A Yes, and we got on the flight.

Q And did you have all of your baggage with you?

A Yes.

Q And when you got on the flight. . . . When you were flying this time, were you flying third class or first class?

A First class.

Q How did you manage to be flying first class?

A Andy bought the tickets.

Q So you don't know how you ended up being in first class.

[8] A No, I don't.

Q Now, when you got on the plane, then the plane flew to Honolulu?

A That's right.

Q Now, what happened when the plane landed in Honolulu?

A We both got off the flight and we walked to the taxi ramp.

Q Did anything unusual happen between the time you got off the plane and when you walked over to where the taxis were?

A Not between that time.

Q What happened as you walked to the taxi?

A Andy was approached by somebody.

Q What did you observe?

A That he was grabbed on the arm.

Q Okay. And then what happened? What happened next? When you saw him grabbed by the arm, what did you do?

A I kept still walking towards him.

Q And then what happened?

A Then I was being grabbed by a woman on the arm.

Q When she grabbed you, what did she say? What happened when she grabbed you?

A She introduced herself.

Q What did she say her name was?

A Karen. I can't remember her last name, but she was a [9] federal police, and she asked me: We would like to talk to you.

Q What did she tell you then?

A I put my bag down and she said pick up your bag and come this way.

Q Now, did she tell you that you were not under arrest?

A She didn't say.

Q Did you feel you had the right to leave?

A No.

Q She just told you to pick up your bag and come with her, is that correct?

A That's right.

Q Okay. And was she still holding your arm?

* * *

THE WITNESS: Andrew Sokolow, S-o-k-o-l-o-w.

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Mr. Sokolow, directing your attention to July 22nd, 1984, first of all, where do you reside? What is your address?

A 348-A Royal Hawaiian Avenue.

Q Were you residing there on July 22nd, 1984?

A Yes.

Q And was Janet Norian residing with you?

A Yes.

Q Anyone else residing with you at that address?

A Karl Herman.

Q What is the telephone number there?

A 926-3481.

Q And whose name is that telephone number under?

A Karl Herman's name.

Q And how long have you resided with Mr. Herman?

[11] A Approximately six months or seven months.

Q And on July 22nd, you went to Miami, is that correct?

A Yes.

Q And you purchased your airline ticket at the airport?

A Yes, I did.

Q And you purchased two round-trip tickets.

A Yes, I did.

Q And you paid twenty-one hundred dollars in cash for them, is that correct?

A I believe so.

Q And then you went to Miami?

A Yes, I did.

Q And you stayed with some friends in Miami.

A Yes.

Q And then you boarded a flight returning to Honolulu on July 25th, 1984?

A Yes.

Q And, when you boarded these flights, did you have any check-in luggage, either you or Janet Norian?

A No, we didn't.

Q So you flew from there to Denver.

A Yes.

Q And then to Los Angeles.

A Yes.

Q Now, when your airline landed in Los Angeles, what, if [12] anything, did you do?

A We deplaned. When I got off the plane, I looked at the departure schedule to make sure what gate we had to be at and what time we would be boarding or departing; and, after I did that, I don't remember if I had to walk very far to a different gate or not, but I got to the gate

where we had to be and I put our things down and I sat down and took off my shoes and relaxed. I took out a magazine and started to read it.

After a few minutes, Janet left everything with me and went to the store and came back a little while later with something to drink for her and a couple of candy bars. I was lying down and relaxing, and I had my magazine out. When she got back, I just kind of sat up and read my magazine. Nothing special other than that.

Q Were you walking around?

A No.

Q Were you or her looking around?

A I, you know, being the fact that I was reading most of the time, I don't remember exactly what she was doing. I was reading and I guess I looked up and I probably noticed a few pretty girls. Nothing more than that.

Q Okay. And what happened next?

A A little while later we got back on the plane to go to Honolulu. I just got on the plane and we got to our seats [13] and put our baggage appropriately away and sat down.

Q Were you flying first class?

A Yes.

Q How was it that you were flying first class?

A I asked for coach ticket, and, when we finally got on the flight, there was nothing but first class.

Q Is this on the flight going to Miami or back?

A Coming back.

Q And how did you fly to Miami? Did you fly first class or coach?

A I believe we flew coach. I'm not a hundred percent sure.

Q When you left Miami on your first flight, did they put you on coach or first class?

A They put us in first class. The entire route back, they only had availability of first class.

Q Did you have to pay extra for that?

A I believe we did.

Q Where did you pay that extra fare? Did you pay for it at Miami or Honolulu?

A In Miami.

Q You paid additional funds at Miami to go first class.

A Yes.

Q And then, when you landed in Honolulu, what, if anything occurred?

A When we landed, we got off the plane and walked from the [14] gate to the main terminal area instead of waiting for the bus, and we walked directly there; and, because we had no baggage checked in, we got to the main terminal and walked directly down the escalator towards the street and did not go into the baggage claim area.

Q All right.

A When we got to the street, I walked directly to one of the cab dispatchers and asked him for a cab. I walked—there were a couple of parked cars—I walked behind one of them to get out on the street, and, as the cab was pulling up, I got grabbed on my left arm.

Q What happened? As best as you can recollect, describe to the Court what occurred then. Were you grabbed lightly?

A I wasn't knocked over, but I would have to pull my arm away to get out.

Q What happened after you were grabbed there on the street?

A I looked up to see who was grabbing me.

Q What did you notice when you looked up?

A I kind of noticed vaguely that there was somebody right close to me on my right, but I was looking more

toward the left and I noticed that there was a guy grabbing my arm. The guy who grabbed my arm was right there, and I noticed that someone said this is the guy, and the cabbie waved the cab off, the cab dispatcher, and I was kind of let's say definitely guided back on to the sidewalk. I wasn't dragged. I didn't [15] go off on my own volition.

Q You didn't go on your own volition.

A No.

Q Were you pulled? Was there tugging on your arm?

A Like I said, I wasn't dragged off my feet, but I was definitely moved over there.

Q And then they moved you back on the sidewalk, is that what they did?

A Yes.

Q What, if anything, happened then?

A I noticed there was a bunch more guys and I think one lady that kind of surrounded me and I heard someone say like grab her, too, and they kind of surrounded me, and Janet was a few feet away from me and we were both pretty much surrounded.

Q What occurred then?

A They asked me what my name was. They said, either as they were walking up the sidewalk or right when we got there, they were DEA officers, and they were going to ask me some questions. They asked me my name and what name I travelled under and they asked my why I was travelling under my. . . . My ticket had a different name on it. I asked them what was going on. And they said what's going on is that we believe that you went down to Miami to pick up some "toot" and we're going to put some dogs on your luggage, and if they respond to your luggage, I would be placed under arrest.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAII

CRIMINAL NO. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF,

vs

ANDREW SOKOLOW, DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Friday, November 2, 1984, at 2:10 P.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE BERT S. TOKAIRIN, U.S. Magistrate.

APPEARANCES:

MICHAEL SANTOKI, ESQ.
Assistant U.S. Attorney
Room C-242, U.S. Courthouse
300 Ala Moana Boulevard
Honolulu, Hawaii

Appearing for
the Plaintiff;

ROBERT P. GOLDBERG, ESQ.
130 Merchant Street
Suit 2020
Honolulu, Hawaii

Appearing for
the Defendant.

* * *

THE WITNESS: Sure. John D. McCarthy. My last name is M-c C-a-r-t-h-y.

DIRECT EXAMINATION

BY MR. SANTOKI:

Q Sir, how are you employed?

A I'm employed as a Honolulu police officer assigned to the Drug Enforcement Task Force.

Q And you were one of the officers that worked in Mr. Sokolow's case, is that right?

[3] A Yes.

Q In the stipulated facts, these facts are included: Mr. Sokolow and Janet Norian were taken from the sidewalk area back into the building at the airport. . .

A Correct.

Q . . . where a dog examination was performed. My one question to you is: Why were they taken from the sidewalk area back inside the building?

A The main reason being that the dog is not allowed to be run on luggage in a public open area.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case No. CR 84-02200

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW SOKOLOW, DEFENDANT.

Honolulu, Hawaii
September 22, 1986
2:06 P.M.

Hearing Responding to Order of 9th Circuit

Before SAMUEL P. KING
District Judge

APPEARANCES:

For plaintiff:

MICHAEL SANTOKI
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For Defendant:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

* * *

THE WITNESS: John D. McCarthy, last name is spelled M-c-C-a-r-t-h-y.

DIRECT EXAMINATION

BY MR. SANTOKI:

Q Would you tell us how you're employed please, sir?

A I'm employed by the Honolulu Police Department and assigned to the Drug Enforcement Administration.

THE COURT: Anyplace where you can get to a mic.

BY MR. SANTOKI:

Q How long have you been with the police department, sir?

A Approximately ten and a half years now.

Q How long have you been assigned to the Drug Enforcement Administration?

[5] A Since February of 1982.

Q Very briefly, sir, have you received any training in the investigation of narcotics offenses?

A Yes, sir, I have.

Q What kind of training?

A I've gone through classes conducted by the Honolulu Police Department and the Drug Enforcement Administration, as well as on the job training with senior agents.

Q During the course of your experience in law enforcement, sir, have you participated in investigations related to narcotics offenses?

A Yes, sir, numerous.

Q On approximately how many occasions?

A I would say at least in excess of 300 or more occasions.

Q Did any of those involve cocaine?

A Yes, sir.

Q Did any of those involve investigations which took place at the Honolulu Airport?

A Yes, sir.

Q How many of your investigations involved cocaine?

A I would say approximately two-thirds or more.

Q And how many of those took place at the Honolulu Airport?

A The majority, almost the entire amount of those cases [6] took place at the airport.

THE COURT: That's where you hang out?

THE WITNESS: Yes, sir.

THE COURT: Did you testify before in this hearing before Judge Tokairin?

THE WITNESS: Yes, sir, I believe so.

THE COURT: So this is different information you're coming out with now?

MR. SANTOKI: I believe that –

THE COURT: I have the transcript of what went on in front of Judge –

MR. SANTOKI: I believe the bulk of what the witness is about to testify to, he did not testify to directly in front of the Magistrate.

THE COURT: I was just trying to have you help me keep it within bounds. Go ahead.

MR. SANTOKI: Certainly.

BY MR. SANTOKI:

Q In the course of your duties as—

MR. GOLDBERG: Just for the record, we—for purposes of this hearing, we are allowing the testimony both to include the testimony that has already been given, and that which goes beyond—

THE COURT: Yes, all testimony previously given is already before me.

[7] MR. GOLDBERG: Okay, but additional new testimony is also being allowed?

THE COURT: Right. And the record may also know that you object to this if—taking any more testimony if you want. You may get to the Supreme Court on that issue.

MR. GOLDBERG: I will make the objection, Your Honor. It does kind of give him two shots at the—

THE COURT: Yes, I mean, it's a possible interpretation of the order that I'm just supposed to make up my mind without any evidence. Go ahead.

BY MR. SANTOKI:

Q In the course of your duties, sir, have you discussed with other law enforcement officers the manner in which cocaine is brought into the District of Hawaii and distributed here?

A Yes, sir.

Q Have you spoken with cocaine users and cocaine dealers also about the manner in which cocaine is brought in and used and distributed?

A Yes, sir.

THE COURT: Did he testify as an expert below?

MR. SANTOKI: No.

THE COURT: Oh.

[8] BY MR. SANTOKI:

Q In the course of your duties, sir, were you stationed at the Honolulu International Airport to investigate narcotics offenses?

A Yes, sir.

Q From when to when?

A From February 1982 until June of last year, 1985.

Q What was your primary responsibility while you were stationed at the airport?

A To investigate narcotics trafficking into and out of the State of Hawaii, primarily at the Honolulu Airport.

Q Was it any part of your duties while you were stationed at the airport to recognize and to make contact with persons who were suspected of being drug couriers?

A Yes, sir.

Q And did you receive any training or information from other officers, or from drug couriers that assisted you in doing so?

A Yes, sir.

Q What was that?

A I received training as well as speaking to the prior defendants or drug couriers that also provided me with information on the subject.

Q As a result of that information, did you develop some expertise in the area of attempting to recognize persons who [9] were transporting narcotics through the airport?

A Yes, sir.

MR. GOLDBERG: Your Honor, I'm going to object at this time. Number one, looking through the prior testimony reports, I can't see how this individual—how

Officer McCarthy, whether or not he was an expert, if there is such a thing in drug detection, whether that type of foundation is necessary for the testimony that's to be given, other than his forming an opinion as to whether the facts on an affidavit are sufficient to warrant the warrant.

THE COURT: Well, he hasn't said so yet, but I assume somewhere along the line, you're going to offer him as an expert on something, and when you got to that point, why you can—up again, and when you do get to that point, stop and let him have a chance, or are you at that point?

MR. SANTOKI: That's fine, Your Honor. We're giving the officer's background, and we will give the other officer's background simply—

THE COURT: I understand that, but are you offering him as an expert? Is he going to testify as to an expert opinion as to profiles and stuff like that?

MR. SANTOKI: He is going to testify to an opinion, and I think his background is relevant to his opinion.

[10] THE COURT: And the—well, if he's going to testify to an opinion, then you're offering him as an expert, right? Only experts can express opinions.

MR. SANTOKI: I don't know that expert testimony is required, but we'll—certainly, we'll stop at that point.

THE COURT: Well, you dig around all you want to, and then if you say he can render an opinion without being an expert, why, then we'll have that one go up to the 9th Circuit.

BY MR. SANTOKI:

Q Officer McCarthy, on July 22, 1984, were you employed by the Honolulu Police Department and assigned to the DEA Airport Task Force?

A Yes, sir, I was.

* * *

Q Agent McCarthy, on July 22, 1984, did you receive information from a United Airline ticket agent named John Birt that Birt had just sold two round-trip tickets to a person who identified himself as Andrew Kray, K-r-a-y, for Kray and his female companion to travel from Honolulu to Miami, Florida?

A Yes, sir, I did.

Q Is Miami a known source city for drugs, to your knowledge?

A Yes, sir.

Q And that round trip was to commence on July 22, 1984, with an open return, is that correct, sir?

A Yes, sir.

MR. GOLDBERG: Your Honor, at this—I'm sorry it's a little late, but I'm going to object to the question and the answer whether Miami is or is not known as a known source city.

THE COURT: Well, he asked him for his opinion, [17] and he said yes. You can cross examine him. Go ahead.

BY MR. SANTOKI:

Q Is it also your understanding that Kray paid for the tickets by giving the ticket agent a large stack of $20 bills from which the ticket agent took $2,100, the price of the tickets, did the ticket agent also tell you that the amount of cash that was returned was approximately equal to the amount of cash that he had taken from the roll?

A Yes, sir.

Q Did the ticket agent describe the person who identified himself as Andrew Kray to you?

A Yes, sir, he did.

Q Was that description of a person being approximately 25 years old, wearing black clothing, and a large amount of gold jewelry?

A Yes, sir.

MR. GOLDBERG: Your Honor, I'm going to object at this time on the basis of this questioning is hearsay testimony.

THE COURT: Yeah, he's just saying this is what the guy told him.

MR. GOLDBERG: And it will be–

THE COURT: That's why I'm letting him read it, because all he's reading is what this guy said.

MR. GOLDBERG: But that individual is not subject [18] to cross examination.

THE COURT: Yeah, but that's not the issue here. The issue is whether he got this information from somebody.

MR. GOLDBERG: Very good, Your Honor.

THE COURT: Go ahead, not whether it's true, but whether he got it from him. Go ahead.

BY MR. SANTOKI:

Q Did the ticket agent tell you that the person who identified himself as Kray appeared nervous when buying the tickets?

A Yes, sir.

Q Did the ticket agent give you a call back number that was given to the ticket agent by the person buying the tickets?

A Yes, sir.

Q Did you run that number?

A Yes, sir, I did.

Q Did it turn out to be listed to a Karl K. Herman, H-e-r-m-a-n at 348-A Royal Hawaiian Avenue, Honolulu, Hawaii?

A Yes, sir.

Q Did you phone that number on July 24, 1984 with the ticket agent?

A Yes, sir.

THE COURT: July 24?

MR SANTOKI: July 24.

BY MR. SANTOKI:

Q Was it July 24?

A Yes, sir.

Q Was there a recording that answered the telephone?

A Yes, sir.

Q Did the ticket agent listen to the voice on the recording?

A Yes, sir, he did.

Q And did the ticket agent identify for you that voice as being the same voice as that of the person that bought the tickets from him?

A Yes, sir, he did.

Q On the same day, July 24, did you learn from the same ticket agent that return reservations had been made in Miami–from Miami to Honolulu?

A Yes, sir.

Q And the return flight was to be the next day, July 25?

A Yes, sir.

Q And the return reservations were made in the same name, that is to say, Andrew Kray?

A Yes, sir.

Q Did you have communications on July 25, 1984, with DEA agents in Los Angeles–

A Yes.

[20] Q –confirming that Kray and his female companion were aboard the flight to Honolulu?

A Yes, sir, I did.

Q Did the agents in Los Angeles tell you that Kray was wearing a black jumpsuit and a large amount of gold jewelry?

A Yes, sir.

Q Did the agents in Los Angeles tell you that during the stopover in Los Angeles, Kray appeared to be very nervous and was looking all around the waiting area?

A Yes, sir.

Q Did you then arrange for someone to meet the airplane and conduct surveillance on Kray at the Honolulu International Airport?

A Yes, sir, I did.

Q Did you do this yourself?

A No, sir, I didn't.

Q Who did that?

A Special agents Dick Kempshall, William Schnepper and task force agent Karen Huston.

Q Did you provide Agent Kempshall in particular with all of the information that you've just given us here today?

A Yes, sir, I did.

THE COURT: All the information you had gotten from the ticket agent and the Los Angeles–

THE WITNESS: Yes, sir.

[21] THE COURT: DEA was it, or police?

THE WITNESS: DEA.

MR. SANTOKI: Thank you, I have nothing further.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q Officer McCarthy, you were with Mr. Birt when he dialed the telephone number that was given by Mr. Kray when he purchased his tickets, were you not?

A I was with him, yes.

Q And you were with Mr. Birt when he–I'm sorry, you were with Mr. Birt when he called Mr. Kray's home telephone number?

A I believe I dialed the number and allowed Mr. Birt to listen.

Q And he recognized the voice as that of Mr. Kray, the individual that had purchased the tickets, did he not?

A He told me that was the same person that had purchased the tickets.

Q Okay. So nothing unusual about that, was there?

A No, not that I know of.

Q In determining a profile, did you take into consideration how an individual dresses?

A Yes, sir.

Q So how an individual chooses to dress may determine whether he may or may not be arrested or stopped at the [22] airport, is that correct?

A It may be a factor, yes.

Q At the time you spoke to Mr. Kempshall, you knew that an individual named Kray had paid cash for a ticket, is that correct?

A That's correct.

Q And you knew that he went to Miami, and he was coming back after a short period of time, is that correct?

A Yes, sir.

Q And you knew that the telephone number he had given the agent when he purchased the ticket was, in fact, his telephone number, at least his voice appeared on the phone, on the answer phone.

A It appeared to be the same person, yes.

Q And he had traveled this–taken this trip also with a companion, is that true?

A A female companion, yes, sir.

Q Okay. Did you take this into consideration in determining the profile?

A Yes, sir.

Q That he was with a female companion?

A Yes, sir.

Q At the time you talked to Agent Kempshall, was there any other factors that you were considering?

A Besides the ticket purchase, the address? The fact [23] that I could not prove or disprove that there was an Andrew Kray in Hawaii is another factor that was considered. That's all that I can think of right now.

THE COURT: Short trip?

THE WITNESS: Short trip, yes, sir.

THE COURT: Did you try to find out if there was anyone named Kray, K-r-a-y?

THE WITNESS: Yes, sir, I made a – I could not find no one by that name.

BY MR. GOLDBERG:

Q Okay, Officer McCarthy, you live in Hawaii, do you not?

A Yes, sir.

Q You've lived here for your whole life?

A Yes, sir.

Q Is it unusual in Hawaii for roommates to share houses, apartments?

A No, sir, not at all.

Q And under those circumstances, would more than one name be listed in the directory?

A Very rarely.

Q So normally, if Mr. Kray had a roommate – in this case, did you know who that telephone number was listed to, in fact?

A Yes, sir, it was subscribed to by Karl Herman.

[24] Q And where did Karl Herman live?

A 348-A Royal Hawaiian Avenue.

Q Okay. In fact, Mr. Herman was the alleged Mr. Kray's roommate, was he not?

MR. SANTOKI: I object to that, Your Honor.

THE COURT: Why? Excuse me – overruled.

MR. SANTOKI: There's no foundation as to whether or not – there's no personal knowledge at the time in question.

THE COURT: Oh, well, he can say – go ahead, you can answer it if you know.

THE WITNESS: I'm sorry, I forgot the question.

BY MR. GOLDBERG:

Q You found out that the telephone number at that address was listed to a Karl Herman?

A That's correct.

Q Okay. Did you further discover that Mr. Herman in fact lived at that address?

A Not until –

MR. SANTOKI: Again I'll –

THE COURT: He can answer the question, he's a police officer.

MR. SANTOKI: Sure, but it's –

THE COURT: But not at that time, is that right?

THE WITNESS: That's correct.

[25] THE COURT: All right, next question.

BY MR. GOLDBERG:

Q Did later you find that Mr. Karl Herman lived at that address?

MR. SANTOKI: Same objection, Your Honor, it's irrelevant if he found out at some other time.

THE COURT: Overruled.

THE WITNESS: Yes, sir.

BY MR. GOLDBERG:

Q And you also found that the alleged Mr. Kray lived at that address?

A I found out that Mr. Sokolow lived at that address.

Q Okay. And in fact, Mr. Herman and Mr. Sokolow were roommates?

A Yes, sir.

* * *

THE WITNESS: Richard C. Kempshall, K-e-m-p-s-h-a-l-l.

DIRECT EXAMINATION

BY MR. SANTOKI:

Q Good afternoon.

A Good afternoon.

Q Would you tell us how you're employed please, sir?

A I'm a special agent with the Drug Enforcement Administration.

[27] Q How long have you been so employed?

A Approximately 15 years.

Q What are your responsibilities as a special agent with the Drug Enforcement Administration?

A To investigate violations of the Controlled Substances Act.

Q Have you received any specialized training which enables you to do so?

A Yes, I have.

Q What was that?

A Initial basic agent school training with the Department of Justice in Washington, and over the years, updated training on various facets of narcotics law enforcement.

Q In the course of your experience with the Drug Enforcement Administration, sir, have you participated in narcotics investigations?

A Yes.

Q Approximately how many?

A Several thousand, I would imagine.

Q Have any of those investigations involved cocaine?

A Yes.

Q Approximately what proportion?

A Probably 50 percent.

Q Have any of those investigations involved cocaine couriers coming through the Honolulu International Airport?

[28] A Yes.

Q About how many cases of that type?

A There's probably been 150, maybe 200 in the last seven years.

Q In the course of your duties with the Drug Enforcement Administration, sir, have you talked with other officers about the manner in which cocaine is transported and distributed?

A Yes.

Q Have you spoken with drug dealers about the manner in which cocaine is transported and distributed?

A Yes.

Q Have you spoken with drug couriers about the manner in which cocaine is transported and distributed?

A Yes.

Q Have you spoken with drug users as well about the same topics?

A Yes, I have.

Q Have you personally observed individuals who later turned out to be drug couriers while they were coming into the District of Hawaii through the Honolulu International Airport?

A Yes, I have.

Q On a few occasions or many occasions?

A Quite a number of occasions, more than a few, within [29] the last – since I've been at the airport since '79, I imagine we've – more than a few, quite a few in the last seven years.

Q How long have you been assigned to the airport detail of the Drug Enforcement Administration?

A Since 1979.

Q And are you still so assigned today?

A Yes, I am.

Q What is your primary responsibility as a part of that task force?

A Our responsibility is to try to intradict [*sic*] a movement of drugs through Honolulu International Airport, both incoming and outgoing.

Q And how do the drugs come in and go out through the airport?

A Any number of ways. They come in through foreign destinations, through U.S. Customs, they come by courier from the mainland, they come by small package express run by the airlines, they come by personal, private express companies, like Federal Express, they come through the customs mail branch, they come by boat, and they come by private plane.

Q Would it be fair to say that as a result of your training and experience in conversations with other officers and drug dealers, couriers and users, that you have developed [30] a background of information that might be a little bit more than the average citizen might have with respect to the manner in which cocaine is transported through the airport?

A Yes, that's true.

Q And have you also developed some information concerning typical characteristics of cocaine couriers?

A Yes, I have.

* * *

[33] Q Is it unheard of for a person who is carrying drugs to be traveling with someone?

A No.

Q Do people occasionally take other people with them to disguise their true purpose?

A Yes.

MR. GOLDBERG: I'm going to object to that question, Your Honor, I think it's a double opinion there.

[34] THE COURT: Well, I'll sustain the objection to it, and the answer may be stricken. Go ahead, Mr. Santoki.

BY MR. SANTOKI:

Q Has anyone ever told you that they traveled with a companion to disguise their true purpose?

A Yes.

Q Directing your attention, sir, to July 25, 1984, did you receive information from Agent John McCarthy about a person going under the name of Andrew Kray?

A Yes.

Q And was this a part of your duties as a DEA Airport Task Force Agent?

A Yes, it was.

Q Was that information that Agent McCarthy had been told on July 22, 1984, by a United Airlines Ticket agent named John Birt that Birt had just sold two round trip tickets to a person who identified himself as Andrew Kray, for Kray and his female companion to travel from Honolulu to Miami, Florida, a source city for drugs on July 22, 1984, with an open return, that Kray paid for the tickets in cash by giving the ticket agent a large stack of $20 bills from which Birt took $2,100 in cash, and noted that the amount left was approximately equal to the amount taken?

A Yes.

Q And did Agent McCarthy also tell you that the ticket [35] agent told him that Kray was approximately 25 years old, wearing black clothing and wearing a large amount of gold jewelry, and that Kray appeared nervous when purchasing the tickets?

A Yes, he did.

Q Did Agent McCarthy also indicate to you that when the telephone call back number given to Birt by Kray was dialed, Birt identified the voice on the telephone recording that answered the phone as being the same voice as that of the person that had bought the airline tickets under the name of Andrew Kray?

A Yes, I knew that.

Q And also did you know, and were you told that the telephone call back number that we've just discussed was listed under the name of Karl Herman at 348-A Royal Hawaiian Avenue, Honolulu, Hawaii?

A Yes, I knew that.

Q And were you also told that on July 24, 1984, reservations were made in Miami for the return trip to Honolulu from Miami in the names of Andrew Kray and his companion for the next day, July 25, 1984?

A Yes.

Q And did you also know that DEA agents in Los Angeles confirmed that Kray and his companion were aboard the flight to Honolulu, and that those same agents indicated Kray was [36] wearing a black jumpsuit and a large amount of gold jewelry, and that during a stopover in Los Angeles, Kray appeared to be very nervous and was looking all around the waiting area?

A Yes, I knew that.

Q At that point in time, did it become your responsibility to make some contact with the person going under the name of Andrew Kray when he arrived in Honolulu?

A Yes.

Q Did you do so?

A Yes, I did.

Q And that would have been at approximately 6:27 p.m. on July 25th, 1984?

A Yes.

Q Where did you make contact with the person going under the name of Andrew Kray?

A On the curbside, on the ground floor of the Honolulu International Airport facing the street.

Q Why did you make contact with him?

THE COURT: Just a second now, was he on the curb, or was he on the street, by the outside of a cab?

THE WITNESS: My best recollection, Your Honor, is that he was standing right on the curb.

THE COURT: All right.

BY MR. SANTOKI:

Q Why did you make contact with him?

[37] A We stopped him at that point to identify him and to try to determine whether he was, in fact, a drug courier from Miami.

THE COURT: Who's we?

THE WITNESS: Myself and Special Agent William Schnepper.

THE COURT: Was there a woman there too?

THE WITNESS: Mr. Sokolow's traveling companion.

THE COURT: No, another woman?

THE WITNESS: Yes, there was—Officer Karen Huston was also present.

THE COURT: So how many all together and the officers, you—

THE WITNESS: Well, myself and Schnepper stopped Sokolow, and he was separated from Janet Norian, the girl, by several feet, and Officer Huston, and another special agent, excuse me, I forget his name now, another special agent from Washington DO [*sic*], they talked to the girl separately.

THE COURT: There were four of you, and two—

THE WITNESS: Yes, myself, and Schnepper and Karen and Desmond, Special Agent Desmond.

BY MR. SANTOKI:

Q Agent Kempshall, this is all being recorded, so I'd like to ask you to speak into the microphone when you answer the questions, if you would. There were a total of four [38] officers there?

A That's correct.

Q Were the officers in uniform or plain clothes?

A Plain clothes.
Q Did any of the officers display any weapons?
A No.
Q You indicated that you stopped Mr. Kray. Now, stopped is sometimes used as a legal term. Let me ask you what you actually did there at the curbside.
A He was standing on the curbside with his back to us, and Schnepper and I walked up to him, I had my credential folder in my left hand, and I displayed my credentials and said I'm Agent Kempshall with DEA and I'd like to speak with you for a minute.
Q Where was Mr. Kray's traveling companion at that precise moment in time?
A She was to my rear several feet, and Agent Huston and Desmond had just approached her at that same time.
Q Did the person going by the name of Kray speak with you?
A Yes, he did.
Q What—strike that.
Where did you talk to him initially?
A Standing on the curbside right there in front of the airport.
Q A public area?
[39] A Yes.
Q And did you ask him any questions?
A Yes.
Q What did you ask him?
A I first asked him whether he had any identification, personal identification.
Q And what did he say?
MR. GOLDBERG: Your Honor, at this time I would make an objection. Just for the record, I want to find out exactly where this conversation occurred, where and when.
THE COURT: You'll have a chance to ask him. Go ahead, Mr. Santoki.

BY MR. SANTOKI:
Q What did he say?
A He said he did not have any identification on him.
Q What else did you speak with him about?
A I asked him if I could see his airline ticket, and he replied that he'd lost the stub for his airline ticket.
Q Did you ever ask him what his name was?
A Yes.
Q And what did he say?
A He said that he was Andrew Sokolow.
Q What did you then ask him?
A I asked him, if your identity is Andrew Sokolow, why are you flying under the name Andrew Kray?
[40] Q And what did he say?
A He said that an individual who he met on the beach, name of Marty, that he didn't know Marty's last name, had made his flight reservations, and had purchased the tickets, and that his—that Marty had made the name—had made his last name Kray because that was his mother's maiden name.
Q At—
THE COURT: Excuse me just a second. I've got to interrupt you once in a while, because I've read the file here, and there's certain things I need cleared up. Did either you or Officer Shipper, is it? Who was the other officer?
THE WITNESS: Schnepper.
THE COURT: Schnepper. Did either you or Officer Schnepper grab his arm?
THE WITNESS: Not that I recall, Your Honor.
THE COURT: Well, specifically, did you?
THE WITNESS: Not that I recall, no.
THE COURT: Go ahead.

BY MR. SANTOKI:

Q At the time that you spoke with the person who turned out to be Sokolow, did you have any weapons displayed?

A No.

Q Were there any uniformed police officers in the area?

[41] A Not to my knowledge.

Q No lights, no sirens?

A That's correct.

Q Were you physically restraining him in any way?

A No.

Q Had you told him he was under arrest?

A No.

Q Had you told him that he couldn't go anywhere?

A No.

Q Had you threatened him in any way?

A No.

THE COURT: Was there a cab, you know, a fellow who calls cabs, what do you call them?

THE WITNESS: Dispatcher, Your Honor.

THE COURT: Dispatcher. Was there a dispatcher there?

THE WITNESS: Yes, Your Honor.

THE COURT: From the cab company?

THE WITNESS: Yes, Your Honor.

THE COURT: Any other people around?

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead.

BY MR. SANTOKI:

Q At the time that the person going by the name of Kray told you this business about having met a person named Marty [42] on the beach, et cetera, et cetera, did you form an opinion as to whether or not that was the truth?

A Yes.

Q What was your opinion?

A That he was lying about that.

Q Why did you think he was lying?

A Because I already knew that John Birt had described the person that bought the ticket under Andrew Kray as being a male, physical description that fit Sokolow, and that in fact, he described the black clothing and the gold jewelry, which, in fact, he still had on, and also that he had identified the voice on the tape machine as the person who had bought the ticket, so I knew that the—I was unsure of the identify of the person before me, but I knew that he had purchased the ticket under the name of Andrew Kray.

Q At the time the person that flew under the name of Andrew Kray told you about Marty making the tickets, were you also aware that the return reservation had been made in Miami under the name of Kray?

A Yes, I was.

Q Based upon all of this information, what did you do at that point?

A After we discussed about him flying under an alias, et cetera, I advised him that at this point, I was going to [43] seize his luggage and subject it to a sniffer dog examination.

Q Now, up to that point in time, what was the person going under the name of Kray, what was his demeanor, how was he acting?

A He was one of those slick talking, I mean, very personable salesmen type personality, outgoing, talkative, in a sense.

THE COURT: Did you have an exchange with him out there on the curb whereby he asked what's going on here and you told him, did something like that happen? Did he say what's this all about?

THE WITNESS: I don't recall, Your Honor, he might have, I just don't recall.

THE COURT: Did you tell him, we're looking at you as a possible courier of cocaine?

THE WITNESS: I don't recall.

THE COURT: Well, when you identified yourself, did you tell him we're drug enforcement agents?

THE WITNESS: I have a set routine I go through with these people, and normally, I don't recall specifically with Mr. Sokolow, but I would have to say I don't think so, because I normally, when they ask me, well, what's this all about, my standard reply is—I always say, well, we're looking for somebody coming from the mainland. I don't—

THE COURT: You don't say what for?

[44] THE WITNESS: No, I don't say we're looking at you as a suspected drug courier or anything else. My standard reply is, well, we're just looking for somebody coming from the mainland.

BY MR. SANTOKI:

Q When you asked Mr. Sokolow for his identification or his airline ticket, were you in fact asking, or were you demanding, or were you insisting, or how did that come about?

A I asked him if I could see some personal identification, and he says, well, I don't have any on me. I said, well, how about your airline ticket, do you have that? And he says no, I lost it, I must have left it on the plane.

Q At some point in time, you did indicate to him that you wished to have his luggage examined.

A That's correct.

Q Did you explain why at that point?

A No, I just said, I'm going to have your dog—your luggaged [*sic*] checked out by a sniffer dog.

* * *

THE COURT: Now, this area is what the 9th Circuit wants to know about, so could you go inch-by-inch from the curb to—through the dog examination?

BY MR. SANTOKI:

Q Yes, sir. Why did you have the bag examined by a narcotic detector dog?

A Because I suspected that he'd gone to Miami to pick up cocaine and bring it back.

[48] Q. Based upon what information?

A The totality of the information, starting with the fact that he had paid for the round-trip tickets in cash from a large roll, the fact that he paid, you know, in cash, thus avoiding using any credit cards, or checks, or anything with his name on it, the fact that it was a very quick turn-around from Miami, which is obviously a notorious source of cocaine for most of the United States. The fact that once I stopped him and talked to him, he stated that he didn't have any personal identification whatsoever. When I asked him for his airline ticket, he also stated that he didn't have his airline ticket.

THE COURT: He'd just gotten off the plane?

THE WITNESS: He'd just—yeah, he'd just come off the plane from Miami, and we had discussed it and figured it out previously, he'd only spent about 24 hours in Florida, he'd flown 6,000 miles to spend 24 hours in Florida, and it had all the classic aspects of a drug courier.

THE COURT: You were aware that some attempt to find somebody named Kray in Hawaii?

THE WITNESS: I knew that they had called his call back number that he had left with United, and that it was an answering machine. I knew that the subscriber to the telephone call back number had come back to a Karl Herman. [49] Actually, at that point, I believed him to be Karl

Herman, I thought he was Karl Herman at that point. I did not believe that Andrew Kray was his correct name, but I thought it was Karl Herman.

THE COURT: So you didn't even believe that Andrew Sokolow was his name?

THE WITNESS: No, I did not, not at that point.

* * *

[65] BY MR. GOLDBERG:

Q And McCarthy had told you that the guy was taking a short flight to Miami, a source city, is that correct?

A [Agent Kempshall] That's correct.

[66] Q. What other—as far as source cities go, isn't it true that San Francisco, and Los Angeles, and San Diego are also source cities?

A It's not necessarily—it's kind of hard to explain. It's not necessarily a straight line, it's more of a branching thing. Yes, Los Angeles is a source of cocaine for Hawaii, specifically. Of course, Miami is the granddaddy source city of them all. I mean, Miami feeds Los Angeles, Los Angeles feeds Honolulu. He just skipped Los Angeles and went straight to the source.

Q San Diego is also considered a source city for Honolulu, is it not?

A In a way, yes, it's a feeder from the mainland.

Q And San Francisco also?

A San Francisco normally is considered a source for hallucinogenics, LSD and pills, and stuff, not so much for cocaine.

Q So an individual doing a short, one day flight to one of those source cities would also be suspicious under the profile?

A Well, it has more—there's more factors involved than just the fact that it's a quick turn-around. There are legitimate reasons that business people might make a short

trip. It's a totality of a lot of different factors involved.

[67] Q There's also legitimate reasons why people may pay cash for tickets, are there not?

A That's correct.

Q When you first approached the defendant at the airport on July 25th, you knew he was coming in from Miami on a short flight, a short trip, he was—left on the 22nd, now he's returning on the 25th.

A That's correct.

Q You knew he had paid cash for a ticket.

A Yes.

Q And someone had told you he was nervous in Los Angeles.

A That's correct.

Q And you knew he was dressed in black with a lot of gold?

A That's correct.

Q And you knew that when you called the telephone number that he said was his, you got his name on the message phone, but in fact it was not in his name.

A Say that again?

THE COURT: Didn't get his name?

BY MR. GOLDBERG:

Q You didn't get—in other words, when you called the telephone number he'd given you guys, you got his voice—

A That's correct.

Q But the phone was registered, unfortunately, to his [68] roommate, a different person.

A To a Karl Herman, yes.

Q Okay. That's all you knew at the time that you first approached him at the airport?

THE COURT: You didn't know it was a different person, he thought it was the same person with a different name.

THE WITNESS: I knew that the individual had been flying under the name Andrew Kray.

BY MR. GOLDBERG:

Q Okay. But you thought it was Karl Herman?

A I did, yes.

Q Now, normally, don't you normally reach these people as they're deboarding the airplane?

A Could you say that again?

Q I'm sorry, let me withdraw that question. When you first observed the defendant, he was at the roadside, he had gotten off the plane and walked all the way down to the street level, had he not?

A We had followed him down.

Q You had followed him down there from where?

A From the plane.

Q Did you attempt to have any conversation with him anywhere along the line?

A No.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 84-02200

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

ANDREW SOKOLOW, DEFENDANT.

INDICTMENT
[21 U.S.C. § 841(a)(1)]

INDICTMENT

The Grand Jury Charges:

That on or about July 25, 1984, in the District of Hawaii, ANDREW SOKOLOW did intentionally and knowingly possess with intent to distribute approximately 1,063 grams (gross weight) of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

DATED: Honolulu, Hawaii, August 2, 1984.

A TRUE BILL

/s/ MARY HELEN WONG
FOREPERSON, GRAND JURY

/s/ DANIEL A. BENT
UNITED STATES ATTORNEY

/s/ ELLIOT ENOKI
ASSISTANT U.S. ATTORNEY

UNITED STATES DISTRICT COURT
FOR DISTRICT OF HAWAII

No. CR84-02200-01

UNITED STATES OF AMERICA

VS.

ANDREW SOKOLOW, DEFENDANT

Filed in the United States District Court
District of Hawaii
Jan. 16, 1985
at 4 o'clock and 30 min. PM.
WALTER A. Y. H. CHINN, CLERK

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date January 16, 1985

COUNSEL

WITH COUNSEL Robert Goldberg, Esq.

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING & JUDGMENT

There being a finding of GUILTY

Defendant has been convicted as charged of the offense(s) of having on or about July 25, 1984, in the

District of Hawaii, intentionally and knowingly possesed [*sic*] with intent to distribute approximately 1,063 grams (gross weight) of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) as charged in the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FIVE (5) YEARS, with a special parole term of THREE (3) YEARS, and that defendant shall become eligible for parole under 18 U.S.C. § 4205(b)(2), at such times as the Parole Commission may determine.

MITTIMUS stayed to January 30, 1985 at 10:00 a.m.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

SIGNED BY U.S. District Judge
SAMUEL P. KING
SAMUEL P. KING Date January 16, 1985

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshall or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 1-16-85
By Dania G. Aibinson
Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 84-002200-02-SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT.

[Filed MAY 11 1988]

ORDER

Before: FERGUSON, NORRIS, and WIGGINS, Circuit Judges.

A majority of the panel voted to deny the petition for rehearing and the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court of the United States

No. 87-1295

UNITED STATES

v.

ANDREW SOKOLOW

ORDER ALLOWING CERTIORARI. Filed June 6, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

A true copy JOSEPH F. SPANIOL, JR.

Test:

Clerk of the Supreme Court of the
United States

By _____
Deputy

No. 87-1295

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether reasonable suspicion that a person is engaged in narcotics trafficking can be based on a commonsense analysis of all the information in an officer's possession, or whether it must be based on at least one factor that constitutes direct evidence of an ongoing crime, plus circumstantial evidence that can be considered only if its significance is verified by empirical or statistical evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OCTOBER TERM, 1988

No. 87-1295

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-33a) is reported at 831 F.2d 1413. The initial opinion of the court of appeals, as amended (Pet. App. 34a-46a), is reported at 808 F.2d 1366. The other orders and opinions in this case, including the order of the court of appeals remanding the case for additional factual findings (Pet. App. 50a-51a); the opinion of the district court on remand from the court of appeals (Pet. App. 47a-

49a); the order and opinion of the district court denying respondent's motion to suppress (Pet. App. 52a-55a); and the magistrate's report and recommendation (Pet. App. 56a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (Pet. App. 1a-2a), and a supplemental petition for rehearing was denied on May 11, 1988 (J.A. 67).[1] On December 30, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1988. The petition was filed on that date and was granted on June 6, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following the denial of a motion to suppress evidence in the United States District Court for the District of Hawaii, respondent entered a conditional plea

[1] The unusual proceedings that the court of appeals followed in taking final action on our supplemental petition for rehearing and our suggestion for rehearing en banc are described in our supplemental and reply memorandum at the petition stage (at 1-3), and in our May 16, 1988, letter to the Clerk of this Court.

of guilty to the charge of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a special parole term of three years. The court of appeals reversed by a divided vote.

1. On July 22, 1984, respondent Andrew Sokolow approached the United Airlines ticket counter at the Honolulu airport.[2] He appeared to be roughly 25 years old; he was dressed in a black jumpsuit and a good deal of gold jewelry; and he was accompanied by a woman. He purchased two round-trip tickets to Miami for $2100 in the names of Andrew Kray and Janet Norian. Respondent paid for the tickets with cash from a large roll of $20 bills that he handed to the ticket agent. The agent counted out $2100, which depleted the roll by about half, and he returned the rest of the roll to respondent. Neither respondent nor his companion checked any luggage, although they had four bags with them. Upon request, respondent gave the ticket agent a telephone number. The ticket agent noticed that respondent seemed nervous while he was buying the tickets. Pet. App. 2a, 56a; J.A. 15, 18, 41-42, 51.

After respondent left for his flight, the ticket agent told Officer John McCarthy of the Honolulu Police Department about respondent's cash purchase of the tickets. Officer McCarthy, who was a member of the Department's Airport Task Force, checked the tele-

[2] The facts were developed at suppression hearings conducted by the magistrate and the district court on three separate days. In addition, the parties stipulated to facts contained in the affidavits of Honolulu Police Officer John McCarthy that were filed in support of search warrant applications in this case. J.A. 18-21.

phone number that respondent had left with the ticket agent and learned that it was listed to a "Karl Herman." Officer McCarthy was unable to find any Hawaii listing under the name "Andrew Kray."[3] The ticket agent later identified respondent's voice on a recorded message at the telephone number respondent had left. Pet. App. 2a-3a, 56a-57a; J.A. 15-16, 42-43, 45-46.

Officer McCarthy subsequently learned that respondent and Norian were scheduled to return to Honolulu on July 25, three days after they had left. He also learned that on the way back from Miami they were scheduled to make stopovers in Denver and Los Angeles. Narcotics agents subsequently spotted respondent, during his return trip from Miami, in a waiting area at the Los Angeles airport. The agents noticed that respondent "appeared to be very nervous and was looking all around the waiting area." J.A. 43-44; see *id.* at 16, 19.

Respondent and Norian arrived in Honolulu at about 6:30 p.m. on July 25. Respondent was wearing the same black jumpsuit and gold jewelry. Once again, he and Norian had checked no luggage but were carrying four bags. Upon deplaning in Honolulu, they walked directly to a street level taxi stand. The narcotics agents who had been watching respondent decided to approach him to examine his identification and airline tickets. Pet. App. 3a, 57a; J.A. 16, 29, 31, 43, 57.

At 6:41 p.m., while respondent was waiting for a cab, Drug Enforcement Administration (DEA)

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[3] After respondent's arrest, the agents learned that "Karl Herman" was respondent's roommate. Pet. App. 2a-3a; J.A. 23-24, 47.

Agent Kempshall displayed his credentials, took respondent by the arm, and guided him back onto the sidewalk. Pet. App. 47a, 57a; see J.A. 31-32.[4] Agent Kempshall asked respondent for his ticket and identification; respondent replied that he had neither. Respondent told the agents that his name was "Sokolow" but that he was traveling under his mother's maiden name, "Kray." He also claimed that a man named "Marty," whom he had met on the beach, had purchased the tickets for him. Pet. App. 3a, 57a; J.A. 16, 19, 31-32, 53-55, 57-58.

Agent Kempshall then told respondent that his luggage would be examined by a narcotics detection dog, and respondent carried his bags to the airport customs area. At 6:54—less than 15 minutes after the agents had approached respondent—the dog alerted to respondent's brown shoulder bag.[5] The agents arrested respondent, took him to the Customs Service airport area, and sought a warrant authorizing a search of the shoulder bag. In the meantime, a woman with an extensive record of narcotics and prostitution arrests was brought into the DEA office on an unrelated matter. She identified respondent as a person she knew as "Andrew" who had purchased two or three "papers" of heroin a day over the past two years from her supplier. Pet. App. 4a, 57a-58a; J.A. 16-17; 10/29/84 Tr. 16-21; 9/22/86 Tr. 49-59, 76.

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[4] Agent Kempshall denied that he had any physical contact with respondent at that time. J.A. 55-56. Nonetheless, the district court found respondent's account of the event, in which he claimed that one of the agents grabbed his arm and guided him back to the sidewalk, "reasonably believable." Pet. App. 47a; see J.A. 31-32.

[5] The dog had correctly identified the presence of controlled substances on hundreds of prior occasions. J.A. 17.

After the warrant issued, the agents searched the brown shoulder bag. They found no narcotics, although cocaine residue was later found in that bag. 9/22/86 Tr. 62, 64. The agents did uncover some suspicious documents,[6] and they had the narcotics detection dog re-examine the remaining three bags. That time, the dog alerted to a medium-sized carry-on bag. Because it was then 9:30 p.m., the agents told respondent that they could not obtain a search warrant for the bag until the following morning. They permitted respondent to leave but kept his luggage. At 7:45 a.m. the next day, a second narcotics detection dog examined the carry-on bag, and that dog also detected narcotics. The agents obtained a search warrant and found 1000 grams of cocaine inside the bag. Pet. App. 4a, 58a-59a; J.A. 20; 9/22/86 Tr. 62-64, 88-89.

2. Respondent moved to suppress the cocaine. Following an evidentiary hearing, a magistrate recommended that the motion be denied. The magistrate found that the agents had reasonable grounds to suspect that respondent was involved in drug trafficking when they approached him at the curb outside the airport. Pet. App. 56a-62a. The magistrate also found that, once the narcotics detection dog alerted to narcotics in respondent's luggage, the arrest of respondent and the ensuing seizure and searches of

[6] The agents found airline tickets in the names of Andrew Kray and James Wodehouse for two round trips from Honolulu to Miami, as well as Miami hotel receipts for those trips. The agents also found handwritten notes that appeared to be records of drug transactions. In respondent's personal address book, the agents found the names and addresses of persons suspected of drug trafficking. Finally, the agents found keys to four safety deposit boxes. J.A. 20; C.A. Excerpts of Record (E.R.) 60; McCarthy Affs. 2, 3.

his luggage were supported by probable cause. *Id.* at 60a-61a. The district court agreed with the magistrate and denied respondent's suppression motion. *Id.* at 52a-55a.

3. The court of appeals reversed by a divided vote. Pet. App. 34a-46a.[7] The court held that respondent was seized at the curb outside the airport and that the seizure was not supported by reasonable suspicion. *Id.* at 39a-44a. In concluding that the seizure was unlawful, the court separately examined each of the facts known to the agents and concluded that none of them amounted to reasonable suspicion that respondent was involved in narcotics trafficking. *Id.* at 40a-43a. The court found that only one fact gave any support to the agents' suspicion: respondent's purchase of the tickets with a large wad of cash. The court acknowledged that that fact by itself was "close" to "particularized evidence of suspicious activity." *Id.* at 42a. Nonetheless, the court concluded that respondent's $2100 cash purchase of airline tickets was not sufficient, standing alone, to justify stopping him, because it did not indicate that he was engaged in criminal activity at that moment. *Id.* at 43a.

Judge Wiggins dissented. Pet. App. 44a-46a. He found that respondent's $2100 cash purchase of airline tickets "is sufficiently suspicious that the addi-

[7] Before issuing its decision, the court of appeals remanded the case to the district court and directed the court to make supplemental findings on several issues. Pet. App. 50a-51a. Following a further evidentiary hearing on remand, the district court reaffirmed the denial of respondent's suppression motion. *Id.* at 47a-49a. The district court found that respondent had been detained at the curb (*id.* at 47a), but that the detention was supported by reasonable suspicion that respondent possessed narcotics. *Id.* at 47a-48a.

tion of [a] few other relatively anomalous characteristics could support a founded suspicion of illegal activity." *Id.* at 45a. He disagreed with the majority's contention that the cash payment was not evidence of "'ongoing' criminal activity," since large amounts of cash are often used "to conceal illicit travel patterns, or to buy drugs." *Ibid.* When respondent's cash purchase was added to the brevity of the trip, Miami's reputation as a known source city for drugs, and the lack of checked luggage, Judge Wiggins concluded that the agents had reasonable suspicion. *Id.* at 45a-46a. Judge Wiggins criticized the majority for looking at "each evidentiary factor discretely." As he put it, the majority should have viewed "the whole mosaic rather than each tile." *Id.* at 46a.

4. On rehearing the government argued that the court had erred by examining each fact known to the agents in isolation rather than by examining "the totality of the circumstances—the whole picture." *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). In response, the court filed a new opinion taking a different approach. The court, however, adhered to its conclusion that respondent's conviction should be set aside on the ground that the stop was not supported by reasonable suspicion. Pet. App. 1a-21a. In the new opinion, the court stated that in its view the facts known to the agents described "not ongoing criminal activity but a class of people that is predominantly criminal." *Id.* at 10a. It concluded that the government had "unwittingly equate[d] evidence of *behavior that a criminal may engage in* with *behavior indicating an ongoing crime*." *Id.* at 8a (emphasis in original).

The court of appeals segregated the facts that bear on the reasonable suspicion inquiry into two categories: facts describing ongoing criminal activity, and facts describing personal characteristics shared by drug couriers. In the first category the court placed factors such as a person's use of an alias or evasive movement through an airport; at least one such factor, the court held, must be present to justify a finding of reasonable suspicion. Pet. App. 11a-12a. In the second category the court placed factors such as cash payment for tickets, a quick trip to and from a major source city, nervousness, manner of attire, and the absence of checked luggage. Those factors, the court held, are merely characteristics shared by drug couriers in general and are not evidence of ongoing criminal conduct. *Id.* at 12a. Those factors are relevant, the court held, only if at least one factor from the first category is also present. *Id.* at 14a, 19a. Even then, the court further held, agents may rely on factors in the second category only if they can demonstrate with "[e]mpirical documentation" (*id.* at 13a) or "statistical evidence" (*id.* at 14a) that the factor in question does not describe the behavior of "significant numbers of innocent persons." *Id.* at 13a; see also *id.* at 12a.

The court then applied its two-part test to the facts in this case. Pet. App. 18a-20a. It found no evidence that respondent had used an alias, despite the discrepancy between the name he gave the airline ticket agent when purchasing the tickets and the name under which his telephone number was listed. The court noted that "it is not unusual for persons with different last names to share a common residence and telephone." *Id.* at 18a. The court also discounted respondent's nervousness while awaiting a connecting flight at the Los Angeles airport, because "[t]here is no evidence on the record to indicate that

[respondent's] nervousness was indicative of an attempt to evade detection." *Id.* at 19a-20a. In the court's view, "[n]ervousness would appear to be a normal human reaction to air travel today, with a seemingly growing risk of mid-air collision and the near certainty of delays that may interrupt the plans of travelers." *Id.* at 20a. Having discounted the evidence that respondent was traveling under an alias and that he seemed to be nervous, the court rejected as "[un]substantiat[ed]" the government's contention that the combination of all the facts in this case "will rarely, if ever, describe an innocent traveler." *Ibid.*

Judge Wiggins again dissented. Pet. App. 21a-33a. He noted that respondent's detention "was brief, served the important law enforcement purpose of detecting drug couriers, and lasted no more than necessary to effectuate this purpose." *Id.* at 22a. He stated that in his view the majority's approach was "overly mechanistic" and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts." *Id.* at 25a (emphasis in original). In Judge Wiggins' view, the facts in this case established reasonable suspicion. *Id.* at 28a-29a. He placed particular emphasis on respondent's $2100 cash purchase of airline tickets, because "[i]nnocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons." *Id.* at 28a. Such a large cash payment is also inconsistent with a legitimate business trip, he concluded, since it does not provide documentation of expenses that can be used for reimbursement or tax purposes. *Ibid.* Judge Wiggins also noted that the brevity of the trip and the lack of checked luggage were inconsistent with a pleasure trip (*id.* at 28a-

29a) and that respondent's nervous and watchful behavior during the stopover on his return trip was "hardly a sign of an innocent traveler." *Id.* at 29a. The majority's approach, Judge Wiggins warned, "effectively throttles the efforts of drug enforcement agents to combat escalating narcotics trafficking" (*id.* at 33a) and would render invalid "many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics." *Id.* at 21a.

SUMMARY OF ARGUMENT

A. The facts known by the narcotics agents when they stopped respondent supported a reasonable belief that respondent was engaged in criminal activity. First, respondent's large cash purchase of airline tickets was unusual and made it appear unlikely that he was on a legitimate business or personal trip; instead, the use of such a large amount of cash suggested that the trip might have an illicit purpose, because the use of cash could help respondent to conceal his identity. Second, the discrepancy between the name that respondent gave the airline ticket agent and the name under which his telephone was listed suggested that respondent might be using an alias, which is a common practice for drug smugglers. Third, his destination, Miami, is a major source of narcotics. Fourth, respondent's long trip to Miami for only a very brief stay indicated that he was not on a vacation. Fifth, respondent's nervousness, in light of the other evidence, suggested that he was engaged in an illicit venture. Sixth, the other facts, such as respondent's exclusive use of carry-on baggage, were also consistent with drug trafficking, since the use of carry-on bags allows for a quick departure from an airport and lessens the risk that the bags in

which the narcotics are secreted will be lost or accidentally opened.

B. The court of appeals devised a new two-part test to govern the reasonable suspicion determination in the airport context. That test is overly mechanical and impedes rather than assists analysis of the strength of the evidence adduced in support of a narcotics officer's judgment.

The court of appeals' test is based on a misinterpretation of this Court's decision in *Reid* v. *Georgia*, 448 U.S. 438 (1980). *Reid* did not adopt a new reasonable suspicion test that requires the police to discount any fact that may have an innocent explanation. In fact, *Reid* and the Court's other decisions on reasonable suspicion make clear that the police can consider all the circumstances, including entirely lawful conduct, in determining whether they have sufficient justification to detain a suspect briefly for investigative purposes. The court of appeals' test also disregards the Fourth Amendment principles that the Court has articulated to guide the reasonable suspicion determination. Requiring empirical proof that particular characteristics are not shared by large numbers of innocent travelers ignores the principle that reasonable suspicion does not require the same level of confidence required for proof at trial or for probable cause. It also ignores the principle that the facts must be considered as a whole, and the principle that the evidence must be viewed in light of the inferences that can be drawn by trained law enforcement officers. Finally, the court of appeals' test would prove unworkable in the field, and would prevent agents from briefly detaining suspected drug smugglers absent the direct observation of criminal conduct and a high degree of certainty about the

sufficiency of circumstantial evidence. As a result, the court of appeals' test would seriously interfere with the efforts of federal and local police to halt narcotics trafficking through the nation's airports.

ARGUMENT

THE BRIEF INVESTIGATIVE DETENTION OF RESPONDENT DID NOT VIOLATE THE FOURTH AMENDMENT

A. The Facts Known By The Agents Justified Their Belief That Respondent Was In Possession Of Narcotics

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has consistently held that a police officer may stop and briefly detain a person for investigative purposes if the officer observes suspicious conduct that leads him reasonably to conclude in light of his experience that criminal activity may be afoot, even if the officer lacks probable cause to believe that the suspect has committed or is about to commit a crime. *Terry* phrased the inquiry as whether "specific and articulable facts, taken together with rational inferences from those facts," suggest that a crime "may be afoot." 392 U.S. at 21, 30. See also *United States* v. *Cortez*, 449 U.S. 411, 417 (1981) (stating the inquiry as whether the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity"). The answer to that inquiry will turn on the facts of each case, but the Court's decisions have established three important principles to guide the application of that test to the facts.

First, a law enforcement officer is not required to exclude all innocent explanations for the suspect's conduct, or even to conclude that the suspect's actions

are more likely to be culpable than innocent. Rather, an officer may act when he observes suspicious conduct that leads him reasonably to conclude in light of his experience that criminal activity "may be afoot." *Terry* v. *Ohio*, 392 U.S. at 30. Put another way, although the officer cannot rely on his "inchoate and unparticularized suspicion or 'hunch'" (*id.* at 27), the reasonable suspicion standard demands only "some minimum level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984).[8] *Second*, in determining whether a set of factors gives rise to reasonable suspicion, it is wrong to consider each factor in isolation and to determine whether it standing alone supplies reasonable suspicion. On the contrary, "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account" when determining if there is reasonable suspicion that a person may be connected with criminal activity. *United States* v. *Cortez*, 449 U.S. at 417.[9] *Third*, the evidence known to an officer must

[8] See also *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985); *Michigan* v. *Summers*, 452 U.S. 692, 699 (1981); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); cf. *United States* v. *Ramsey*, 431 U.S. 606, 612-613 (1977) (explaining that the "reasonable cause" standard of 19 U.S.C. 482 authorizing customs officers to search imported merchandise is lower than the probable cause standard); see generally 3 W. LaFave, *Search and Seizure* § 9.3(b), at 431 (2d ed. 1987) ("it would seem clear that the more-probable-than-not standard is never applicable to a brief stopping for investigation"); *id.* at 432 & n.58 (collecting cases in which courts "quite properly" upheld a *Terry* stop even though the actions observed were consistent with innocent activity).

[9] See also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 n.10 (1975) ("Each case must turn on the totality of the particular circumstances."); *Terry* v. *Ohio*, 392 U.S. at 22 ("a series of acts, each of them perhaps innocent in itself • • • taken together [may] warrant[] further investigation").

be viewed, "fact on fact and clue on clue," in light of the inferences and deductions that a trained and experienced officer would reach, "inferences and deductions that might well elude an untrained person." *Id.* at 418, 419.[10]

In this case, the narcotics agents who stopped respondent outside the Honolulu airport had a particularized and objective basis for suspecting him of possessing narcotics. The facts on which the agents relied are ones that repeatedly have been endorsed by this Court and the courts of appeals in upholding reasonable suspicion stops. See 3 W. LaFave, *Search and Seizure* § 9.3(c), at 446-447 (2d ed. 1987). Those facts were as follows:

> 1. ***Respondent paid $2100 in cash for his airline tickets from a roll of $20 bills that appeared to contain about $4000***

Paying $2100 in cash for airline tickets is unusual. To pay that sum of money from a roll containing about twice that amount in $20 bills is even more exceptional. Most business travelers purchase

[10] See also *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. 544, 563-564 (1980) (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979) (a trained, experienced officer can "perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); *United States* v. *Brignoni-Ponce*, 422 U.S. at 885 ("In all situations the officer is entitled to assess the facts in light of his experience."); *Terry* v. *Ohio*, 392 U.S. at 27 ("due weight must be given • • • to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

airline tickets with a credit card or a check in order to have a receipt for reimbursement or tax purposes. In addition, few persons on a vacation or a pleasure trip carry thousands of dollars in cash in small denominations. The use of cash is, however, commonplace among persons engaged in criminal activity. The cash purchase of airline tickets avoids the need to supply the airline with identification and thereby enables a traveler to use an alias. The use of cash also makes it more difficult for law enforcement authorities to reconstruct a suspect's activities after the fact. Thus, respondent's large cash purchase of airline tickets suggested that he wanted to avoid leaving a trail of receipts behind him, which in turn indicated that he was not traveling for a legitimate business or personal reason. Narcotics traffickers, moreover, commonly have large amounts of cash available to them, both because of the large profits made in that trade and the frequency with which narcotics transactions are conducted in cash. Accordingly, respondent's large cash purchase of airline tickets is a fact suggesting that he may have been involved in illicit activities, and possibly narcotics trafficking.[11]

[11] The cash purchase of airline tickets is a factor that is frequently cited to support a finding of reasonable suspicion. See, *e.g.*, *United States* v. *Whitehead*, No. 87-5093 (4th Cir. May 24, 1988) slip op. 20 ("Whitehead paid for his $403 ticket in cash, thus avoiding the need to present identification"); *United States* v. *Knox*, 839 F.2d 285, 290 (6th Cir. 1988), petition for cert. pending, No. 87-1927; *United States* v. *Espinosa-Guerra*, 805 F.2d 1502, 1508 (11th Cir. 1986); *United States* v. *Hanson*, 801 F.2d 757, 761-763 (5th Cir. 1986); *United States* v. *Williams*, 726 F.2d 661, 663 (10th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Jodoin*, 672 F.2d 232, 234 (1st Cir. 1982).

The court of appeals rejected that inference because it believed that the cash purchase of airline tickets did not demonstrate that criminal activity was afoot "*at that time*." Pet. App. 43a (emphasis in original). That reasoning is flawed. Although some people may purchase airline tickets with cash (*e.g.*, when taking a short shuttle flight), few innocent air travelers use cash to purchase tickets that cost as much as $2100. Moreover, even if respondent's cash purchase did not suggest that he was in possession of narcotics when he *left* Honolulu, it supported the conclusion that he possessed narcotics when he *returned* to Honolulu from Miami. Respondent's cash purchase therefore was an important ingredient in establishing reasonable suspicion.

2. Respondent was traveling under the name "Andrew Kray"; the telephone number that he gave to the airline ticket agent was listed under the name "Karl Herman"; respondent's voice was on the answering machine that responded at the number; and the officers could not verify that an "Andrew Kray" lived in Hawaii

An alias helps to avoid detection, and narcotics couriers, like other criminals, frequently use an alias or give the airlines a false callback telephone number for that purpose.[12] The evidence in this case sup-

[12] See, *e.g.*, *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *United States* v. *Espinosa-Guerra*, 805 F.2d at 1508; *United States* v. *Hanson*, 801 F.2d at 763; *United States* v. *Palen*, 793 F.2d 853, 857 (7th Cir. 1986); *United States* v. *Sadosky*, 732 F.2d 1388, 1393 (8th Cir.), cert. denied, 469 U.S. 884 (1984); *United States* v. *Puglisi*, 723 F.2d 779, 789 (11th Cir. 1984); *United States* v. *Ehlebracht*, 693 F.2d 333, 336 (5th Cir. 1982); *United States* v. *Jodoin*, 672 F.2d at 233; *United States* v. *Berd*, 634 F.2d 979, 986 (5th Cir. 1981) (traveling under an alias is "a practice

plied a basis for inferring that respondent was traveling under an alias and therefore increased the agents' suspicion that he was involved in narcotics trafficking. The court of appeals disagreed, but its reasoning is wholly unconvincing. The court stated that "it is not unusual for persons with different last names to share a common residence and telephone" and for a person "to dictate prerecorded messages on the answering machine even though his or her name is not listed with the phone company as the subscriber." Pet. App. 18a. While persons with different names may occasionally share the same telephone, the agents knew more than that respondent had given the airline a number listed in a different name. They knew that upon dialing the number, they heard a recording in respondent's voice on the telephone answering machine, and they could not find a telephone listing in Honolulu for "Andrew Kray." Because respondent had prepared the message on the telephone answering machine, it was reasonable for the agents to assume that he was the principal user of the telephone.

As it turned out, the agents were correct that respondent was traveling under an alias. But even if the agents had been wrong, the evidence regarding the telephone was certainly sufficient to generate suspicion that respondent was not using his real name, particularly since he had paid cash for his ticket and had thereby avoided having to present

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common to drug couriers"; the use of a false telephone number is "a practice commonly used by narcotics couriers to prevent later detection"); *United States* v. *Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (use of an alias when purchasing an airline ticket "indicated the likelihood of an illicit purpose in the trip").

identification to the ticketing agent. The agents' commonsense judgment that respondent was using an alias is precisely the type of rational inference that law enforcement officers are entitled to draw in deciding whether to conduct a brief investigative stop. *Terry* requires no more.

3. Respondent's destination was Miami

The identity of respondent's destination was also an important factor in establishing reasonable suspicion. As Agent Kempshall testified (J.A. 60), and as this Court, the lower federal courts, and the whole nation know, "Miami is the granddaddy source city of them all" for narcotics, particularly cocaine.[13]

4. Respondent stayed in Miami for only 48 hours, even though the round-trip flight between Honolulu and Miami takes 20 hours

Just as respondent's cash purchase of airline tickets made it unlikely that he went to Miami on business, the brevity of respondent's stay in Miami made it unlikely that he went there for a vacation. Few people spend the equivalent of a full day and

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[13] *E.g.*, *Illinois* v. *Gates*, 462 U.S. 213, 243 (1983) ("In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs."); *United States* v. *Pantazis*, 816 F.2d 361, 363 (8th Cir. 1987) (Miami is "a source city for narcotics"); *United States* v. *Haye*, 825 F.2d 32, 34 (4th Cir. 1987) (Miami is a "known source[] of drug supplies"); *United States* v. *Espinosa-Guerra*, 805 F.2d at 1508; *United States* v. *Berd*, 634 F.2d at 985 (Miami is "a known distribution center for cocaine"); H.R. Rep. 98-444, 98th Cong., 1st Sess. 2 (1983) ("Geography and tradition have made Florida the preferred destination of drug smugglers from South America and the Caribbean").

night on an airplane, traveling 12,000 miles, for a two-day vacation. By contrast, a quick trip to a city (like Miami) that is a major source of narcotics is consistent with narcotics trafficking.[14]

5. ***Respondent was nervous when purchasing his tickets, and he appeared nervous and watchful while he was awaiting his connecting flight in the Los Angeles airport***

Innocent travelers often exhibit nervousness in an airport because of their anxiety about flying. But nervousness in an airport is also consistent with narcotics trafficking, and it is an important fact in an agent's assessment whether a person is transporting drugs. Common sense teaches as much. Carrying narcotics is apt to provoke anxiety, which may manifest itself in subtle, but discernible, ways. That is particularly true if the person involved is aware of the airport drug detection program undertaken by federal, state, and local law enforcement agencies. Nervousness, accordingly, is a natural reaction of someone who is in possession of narcotics (or a large sum of cash to purchase drugs) and who may be

[14] See, *e.g.*, *United States* v. *Whitehead*, slip op. 20 ("after allegedly vacationing in Miami for only two days, Whitehead elected to take a twenty-six hour train trip home, at a cost substantially higher than the price of an airline ticket"); *United States* v. *Pantazis*, 816 F.2d at 362-363 (round trip between Minneapolis and Miami; suspect stayed in Miami only 15 hours); *United States* v. *Palen*, 793 F.2d at 857 (five-day stay in Florida is "a relatively short period of time * * * for a tourist from Alaska"); *United States* v. *Ehlebracht*, 693 F.2d at 336; *United States* v. *Berd*, 634 F.2d at 985 ("a quick turnaround trip" is "a practice frequently employed by [drug] couriers"); *United States* v. *Lewis*, 556 F.2d at 389.

scanning an airport for narcotics agents conducting surveillance.[15]

The court of appeals altogether discounted respondent's nervousness on the ground that he could have been worried about a "mid-air collision" or "delays." Pet. App. 20a. That reasoning fails to consider respondent's nervousness in the context in which it appeared in this case. First, the agents who observed respondent in Los Angeles did not simply report that respondent appeared nervous; they reported that he was nervous and looking around the waiting area—conduct far more consistent with nervousness about apprehension than nervousness about flight risks and delays. Second, if respondent was nervous about flying, it is hardly likely that he would have chosen to take an indirect route back to Hawaii involving two stopovers. Finally, nervousness about flight risks and delays would not explain other suspicious facts in this case. For example, nervousness about mid-air collisions is not likely to lead a person to travel under an alias. By contrast, nervousness about possible apprehension for drug smuggling is entirely consistent with the use of an alias. Thus, the agents properly considered respondent's nervousness as further support for their belief that he was involved in wrongdoing.

[15] Numerous courts have treated a suspect's nervousness while traveling as an important factor in determining the existence of reasonable suspicion. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.); *United States* v. *Gonzales*, 842 F.2d 748, 753 (5th Cir. 1988); *United States* v. *Williams*, 754 F.2d 672, 674 (6th Cir. 1985); *United States* v. *Sadosky*, 732 F.2d at 1393; *United States* v. *Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), cert. denied, 464 U.S. 933 (1983); *United States* v. *Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982).

6. ***Respondent purchased the tickets shortly before the flight; he and his companion checked none of their four bags on either leg of their journey; they returned to Honolulu by a route that involved different flights and included two stopovers; and respondent was young and casually attired***

The above facts are consistent with the modus operandi of a narcotics courier.[16] Purchasing tickets shortly before the flight reduces the time available to narcotics agents to conduct surveillance at the point of departure, or to arrange for followup surveillance at the point of arrival. Using carry-on luggage allows a narcotics courier to leave the airport terminal quickly, and it helps to avoid the risk that his luggage will be misrouted to the wrong destination, accidentally opened by airline employees, or damaged in a manner that reveals its illicit contents. Changing flights is also a means of disrupting surveillance.

Youth and casual attire are not in themselves suspicious, but in conjunction with other factors they are entitled to some weight. Drug smuggling, like most other criminal conduct, is known to be more frequent among the youthful than among the middle-

[16] See, *e.g.*, *Florida* v. *Royer*, 460 U.S. at 502 (plurality opinion) (suspect was young and casually dressed); *United States* v. *Mendenhall*, 446 U.S. at 564-565 (opinion of Powell, J.) (changing flights); *United States* v. *Gonzales*, 842 F.2d at 753 (suspect "was dressed loudly, was of a young age," and "carried only a gym bag for a lengthy trip"); *United States* v. *Espinosa-Guerra*, 805 F.2d at 1508 (use of carry-on luggage); *United States* v. *Borys*, 766 F.2d 304, 311 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986) (suspect casually dressed and used carry-on bags); *United States* v. *Berd*, 634 F.2d at 985 (same). Cf. *United States* v. *Brignoni-Ponce*, 422 U.S. at 885 (mode of dress and haircut are relevant factors in determining reasonable suspicion of illegal entry).

aged. In addition, a person carrying a large amount of cash who does not appear to be dressed for a business trip, but who is traveling a long distance for only a short stay at his destination, does not fit easily into one of the usual categories of legitimate air travelers.

A narcotics agent could reasonably draw the following inferences from all of the facts known to the agents in this case. First, respondent did not go to Miami on business. Business travelers ordinarily use travel agencies or credit cards to purchase their tickets. Second, respondent did not travel to Miami for a vacation. Few people who live in Honolulu would take a summer vacation in Miami, a similar tropical locale, but fewer still would spend at least 20 hours traveling in order to spend only two days on vacation. Third, respondent did not go to Miami for another innocent personal reason, such as a wedding or a funeral. A person is not likely to use an alias when traveling to a wedding or a funeral, and petitioner was hardly dressed for such an occasion. Nor was it likely that he was carrying more formal dress, since his carry-on bags were not designed to accommodate a suit.[17] Accordingly, an experienced narcotics agent could quite reasonably believe, based on all the facts, that respondent was involved in narcotics activity.

But even if that conclusion were wrong, a narcotics officer need not conclusively establish that a person is guilty, or even that the odds are 50-50, before he may make a *Terry* stop. This Court's pre-

[17] Respondent's luggage is described in the search warrants issued by the magistrate in this case. See J.A. 13; *United States* v. *Three Pieces of Matching Louis Vuitton Soft Luggage*, No. 84-0245MT (D. Haw. July 26, 1984), slip op. 1; E.R. 56.

cedents require only a rational, objectively based inference that criminal activity "may be afoot." The agents' belief here easily meets that standard.

In fact, the evidence known to the agents was stronger than the evidence in *Florida* v. *Royer*, 460 U.S. 491 (1983), in which eight Members of this Court agreed that the evidence was sufficient to establish reasonable suspicion. *Id.* at 502 (plurality opinion); *id.* at 515-516 (Blackmun, J., dissenting); *id.* at 523-524 (Rehnquist, J., dissenting).[18] In that case, the officers knew that Royer was traveling under an alias, that he had paid cash for his ticket, that he had put only a name and not an address on his checked luggage, that he was young and casually dressed, and that he seemed nervous while walking through the Miami airport. In this case, as in *Royer*, the officers had a strong indication that respondent was traveling under an alias, and they knew that respondent had made a huge cash payment for his tickets, that he was traveling to Miami, that he was young and casually dressed, and that he displayed nervousness in both the Honolulu and Los Angeles airports. But in this case there were even more suspicious factors than in *Royer*: Respondent did not check any bags at all for either trip; his itinerary was bizarre; and his pattern of travel suggested

[18] The evidence in this case was also stronger than the evidence in *Florida* v. *Rodriguez*, 469 U.S. 1, 6 (1984) (suspects at Miami airport spotted plainclothes officers and spoke furtively to one another; one suspect urged the others to "get out of here"; another made strange movements as if to escape; the suspects made contradictory statements regarding their names), and *United States* v. *Mendenhall*, 446 U.S. at 564-565 (opinion of Powell, J.) (the suspect arrived from a drug source city, deplaned last, scanned the gate area, claimed no baggage, and acted as if changing flights).

neither a business trip nor a vacation. What it did suggest, and what in fact turned out to be the case, was that respondent was bringing narcotics back from Miami to Honolulu.

B. The Two-Part Reasonable Suspicion Standard Adopted By The Court Of Appeals Is Inconsistent With Settled Fourth Amendment Law

In its first opinion, the court examined each factor separately and concluded that no individual factor established reasonable grounds to suspect that respondent was engaged in illegal activity when he was stopped. The court did not consider whether the totality of circumstances supplied reasonable suspicion, as this Court has required. *United States* v. *Cortez*, 449 U.S. at 417. In its second opinion, the court took a different tack. In that opinion, the court acknowledged that all of the factors known to the narcotics officers must be considered, but the court then adopted a two-part test under which the court found the information available to the agents to be insufficient. The court created two categories of evidence: one indicative of ongoing criminal conduct (such as the use of an alias), and the other indicative of conduct that criminals often engage in (such as the cash purchase of airline tickets). The court then held that factors from the second category cannot supply reasonable suspicion absent some factor from the first one. Moreover, the court held that before relying on factors from the second category, the government must establish through empirical or statistical proof that those factors identify someone who is presently engaged in criminal activity, rather than someone who is merely a criminal or who is innocent of any crime.

The court of appeals' two-part test is based on a misreading of this Court's decision in *Reid* v. *Georgia*, 448 U.S. 438 (1980). In *Reid*, the Court held that the narcotics officers who stopped the defendant did not have a sufficient basis for an investigative detention. When the officers in *Reid* stopped the defendant, they knew only that (1) he and a companion had arrived in Atlanta from Fort Lauderdale, a source city for cocaine; (2) they had arrived early in the morning, when law enforcement activity is light; (3) both persons carried only shoulder bags; and (4) the defendant and his companion appeared to be attempting to conceal the fact that they were traveling together. The Court ruled that the first three facts were insufficient to constitute reasonable suspicion, because they "describe a very large category of presumably innocent travelers." 448 U.S. at 441. The Court also found that the last fact was insufficient under the circumstances of that case to supply reasonable suspicion. *Ibid.*

The court of appeals erroneously believed that *Reid* adopted a new standard for determining reasonable suspicion, a standard under which facts that "describe a very large category of presumably innocent travelers" must be discounted from the reasonable suspicion determination. But this Court adopted no such test in *Reid*, nor did the Court hold that facts describing innocent travelers are never relevant to the reasonable suspicion inquiry. On the contrary, this Court expressly recognized that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Reid* v. *Georgia*, 448 U.S. at 441. The Court simply found that "this is not such a case." *Ibid.* *Reid* therefore did not purport to

adopt a new reasonable suspicion standard under which lawful conduct is "irrelevant" (Pet. App. 19a) to the reasonable suspicion determination, as the court of appeals concluded, unless that conduct is consistent only with criminal activity.

This Court's other decisions also demonstrate that it would be incorrect to disregard evidence that is equally consistent with innocence and guilt when determining if reasonable suspicion exists. For example, *Terry* v. *Ohio* recognized that a series of acts may be entirely innocent when each one is viewed by itself, but may be suspicious when they are examined in their totality. 392 U.S. at 22. See also *United States* v. *Cortez*, 449 U.S. at 417-419. In *Illinois* v. *Gates*, 462 U.S. 213, 243-244 n.13 (1983), the Court noted that "innocent behavior frequently will provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle is equally applicable to the reasonable suspicion determination. Indeed, *Gates* expressly held that the probable cause standard for an arrest does not require that it be more likely than not that the suspect has committed a crime; only a "fair probability" is necessary. *Id.* at 235, 238, 243-244 n.13.[19] Because the quantum of suspicion necessary for a *Terry* stop is less than probable cause, it follows that the evidence supporting reasonable sus-

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[19] In fact, even the reasonable doubt standard applicable at trial does not require a court to find that the proof is inconsistent with some conceivable hypothesis of innocence. *Jackson* v. *Virginia*, 443 U.S. 307, 317 n.9, 326 (1979); *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

picion need not establish the commission of a crime even half the time.

Reid therefore does not support the court of appeals' conclusion that, before a police officer may make a *Terry* stop, he must prove that the facts known to him do not also fit the description of an innocent traveler. The courts of appeals have made this point expressly. As the Second Circuit once put it in an oft-quoted passage, "[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States* v. *Price*, 599 F.2d 494, 502 (1979) (emphasis in original).

That principle is eminently sensible. Any number of factors standing alone may describe large numbers of innocent travelers as well as a large percentage of drug couriers. For example, wearing casual dress, being young, and not checking baggage certainly describes many travelers. For that reason, one or all of those factors would not be enough, standing alone, to justify an investigative detention. But those factors, in a particular context and in conjunction with other evidence, can properly lead trained officers observing a suspect to conclude that there is enough evidence to distinguish him from the ordinary traveling public to justify a brief detention and inquiry.

The court of appeals' two-part test is also unsound because it treats the factors bearing on reasonable suspicion precisely the way *Terry* said they should not be treated. It creates a false dichotomy between direct evidence—which is roughly equivalent to the court of appeals' category of evidence indicative of criminal activity—and circumstantial evidence—which is roughly equivalent to the court of appeals'

category of evidence indicative of criminal character. But the factors that indicate that a person is a drug smuggler do so precisely because they tend to be associated with the act of drug smuggling. The factors bearing on the issue of reasonable suspicion therefore cannot be neatly lumped into one of two categories, as the court of appeals did in this case.

The fact that the evidence on which the officers relied was circumstantial does not lessen its probative value. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); 1A J. Wigmore, *Evidence* § 26, at 961 (Tillers rev. ed. 1983). "Wigmore's view that circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted. There are innumerable decisions that support the thesis that circumstantial evidence can provide a compelling demonstration of the existence or nonexistence of a fact in issue." 1A J. Wigmore, *supra*, § 26, at 961.

This Court has repeatedly held that circumstantial evidence may be considered in determining whether there are reasonable grounds to link a person with criminal activity. *Adams* v. *Williams*, 407 U.S. 143, 147 (1972), rejected the notion that reasonable suspicion can be based only on a police officer's personal observations of a potential crime. In *United States* v. *Cortez*, which involved illegal entry into this country, the Court pointed out that "all of the circumstances," including "consideration of the modes or patterns of operation of certain kinds of lawbreakers," must be considered in any reasonable suspicion analysis. 449 U.S. at 418. In fact, *Cortez* found it "[o]f critical importance" that "the officers knew that the area [they were investigating] was a crossing point for illegal aliens" (*id.* at 419), and agreed that this "pattern of operations" provided relevant

background information against which the other evidence could be assessed. *Ibid.* Similarly, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975), which also involved illegal entry into the United States, the Court found that a variety of circumstantial evidence is relevant to the reasonable suspicion determination, such as the characteristics of the area in which a person is observed, its proximity to the border, recent border crossings, unusual traffic patterns, and the type of vehicle stopped. See also *United States* v. *Mendenhall*, 446 U.S. 544, 563 (1980) (opinion of Powell, J.) ("Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices.").

To divide the facts typically relied on by narcotics agents into the two categories invented by the court of appeals also improperly denigrates certain highly significant factors. For instance, the large cash purchase of airline tickets is not simply a characteristic typical of many innocent travelers, or even many criminals, as the court of appeals believed. It has a logical bearing on the likelihood that a person is engaged in criminal conduct at that time, because it enables him to use an alias and avoid leaving a paper trail that can tie him to a particular trip.[20] Not

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[20] In this respect, the contrast between the court of appeals' first opinion and its second is striking. In its first opinion, the court regarded the cash purchase of tickets standing alone as being "close" to reasonable suspicion. Pet. App. 42a. In the court of appeals' second opinion, however, the cash purchase of tickets had tumbled into the second category of factors and was not considered relevant at all.

checking luggage is also a technique used by drug couriers. It minimizes the risk of apprehension, by enabling a person to leave an airport terminal quickly, and it lessens the risk that his cargo will be lost or accidentally revealed. Finally, a brief trip to and from a city like Miami is not "evasive" conduct (Pet. App. 11a) and thus would not fit into the court of appeals' first category. Nonetheless, that fact is surely relevant to the question whether a suspect is presently engaged in drug trafficking. Yet the court of appeals' analysis does not take that fact into consideration at all.

The court of appeals' test also assigns too little weight to a suspect's nervousness, which the court placed in the second category—describing criminal character—rather than the first category—describing ongoing criminal activity. Nervousness is especially relevant in the investigation of drug couriers because of their obviously heightened concern about arrest while passing through airports.[21] In relegating nervousness to the second category, the court also failed to realize that an experienced narcotics agent can often distinguish persons who fear flying from in-

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[21] In its first opinion—before it had focused on the fact that there was evidence of nervousness in this case—the court of appeals placed the nervousness factor in the first category, not the second. See Pet. App. 43a (emphasis in original) ("[respondent's] payment in cash is quite unlike a suspect's looking around to see if he was being watched, appearing nervous, taking evasive action, or using an alias while traveling, all of which at least tend to raise a suspicion that criminal activity is going on *at that time*"). By contrast, in its second opinion—in which the court of appeals accepted the district court's factual finding that respondent was nervously scanning the Los Angeles airport waiting area (*id.* at 6a-7a n.5)—the court discounted respondent's nervousness entirely.

dividuals who fear arrest. Accordingly, it is both unrealistic and unresponsive to subtle differences in human behavior simply to lump nervousness as a whole into the category of conduct that does not suggest ongoing criminal conduct.

Another flaw in the court of appeals' two-part test is that it disregards the principle that a reviewing court must examine the facts known to the officer in light of the reasonable inferences that a trained, experienced law enforcement officer will draw. In *United States* v. *Cortez*, 449 U.S. at 418, the Court stated that whether the evidence known by an officer amounts to reasonable suspicion must be determined by the officer's "common-sense conclusions about human behavior," and that the facts "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." See also *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 (1985); *United States* v. *Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *United States* v. *Brignoni-Ponce*, 422 U.S. at 885; *Terry* v. *Ohio*, 392 U.S. at 27. An experienced narcotics agent is a professional observer of criminal activity and can see meaning in conduct that might appear innocent to the untrained eye. *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979).[22] It should be

[22] The narcotics agents involved in this case had extensive experience in apprehending drug couriers. Officer McCarthy had worked with the Drug Enforcement Administration at the Honolulu airport for two years and had participated in 300 narcotics investigations, two-thirds of which involved cocaine and most of which occurred at the airport. DEA Agent Kempshall had 15 years' experience and had participated in approximately 1000 narcotics investigations, half of which involved cocaine. He had been patrolling the Honolulu airport for narcotics traffickers since 1979, and he had discussed the manner in which cocaine is transported with fellow agents and with drug couriers. J.A. 36-39, 48-50.

expected that experienced law enforcement officers will be able to discern criminal conduct that they have been trained or have learned from experience to recognize.

The judgment of experience is particularly important in the case of offenses such as the transportation of narcotics. Smuggling is a crime of stealth, requiring only concealment and escape for its completion. A smuggler's goal is to do as little as possible to provoke suspicion. For that reason, it is not surprising that a person transporting drugs would act in a manner that would not appear highly suspicious to a lay observer. Only by noticing and piecing together subtle clues can a narcotics agent discern whether a particular individual is likely to be carrying contraband.

Contrary to the court of appeals' assumption, the kinds of factors that are important to experienced agents in deciding whether to stop a person traveling through an airport are not readily susceptible to empirical or statistical proof. It is difficult to assign a numerical value to nervousness for statistical purposes. The significance of other incongruities in demeanor, behavior, or dress are equally difficult to quantify. In a case such as this one, how could the government be expected to present statistical evidence regarding the likelihood that a person taking a four-day trip from Honolulu to Miami and back (via an indirect route) would be returning with narcotics? How much empirical evidence is apt to be available regarding the frequency with which persons who pay $2100 in cash for airline tickets are engaged

in illegal activities? By ordering experienced narcotics agents to justify their investigative decisions with statistical proof, the court of appeals has essentially rejected the use of inferences based on common sense and the shared experience of agents in the field. That approach is flatly inconsistent with this Court's decisions.

In requiring empirical proof of the reliability of the factors on which narcotics agents rely in making investigative stops, the court of appeals appeared to be reacting against what it perceived as the improper reliance by the agents on a "drug courier profile" as a device to justify stopping travelers in airports. The agents, however, did not rely on any such "profile" in this case. They relied, instead, on "[t]he totality of the information" about respondent and reasonable inferences that could be drawn from that information based on their experience and common sense. J.A. 59. Respondent was not stopped because he fit some abstract "profile," but because his conduct was unusual in several respects that indicated he might be smuggling drugs.

Moreover, contrary to the court of appeals' assumption, there is no national "drug courier profile" that DEA agents invoke in deciding whether to stop particular individuals as they pass through airports. Over time, of course, agents learn to recognize certain features commonly exhibited by drug couriers. They rely on that experience in making stops, and they share their experience with other agents. But that is no different from the way police officers function in any other investigative context. It is the essence of good police work for agents to enhance their ability to spot criminals by pooling their knowledge and experience with the knowledge and experience

gained by other agents doing similar work. But pooling collective experience is not the same as relying on a mechanical "profile" as a substitute for judgment. Because there was no such reliance in this case—and because the DEA does not purport to have a "profile" that serves as a divining rod to detect narcotics smugglers in every case—there was no need for the court of appeals to invent a new test for assessing reasonable suspicion in the airport context. The traditional test set forth in *Terry* and employed regularly since that time is perfectly adequate to the task.

Besides adding unnecessary complexity to the reasonable suspicion inquiry, the court of appeals' test would also have two grave practical consequences. First, it would prove unworkable in the field, where officers must act without the guidance of a lawyer or a statistician and must rely on their training, experience, and common sense. Second, it would prevent agents from briefly detaining a suspected narcotics smuggler absent a high degree of suspicion based on the direct observation of criminal conduct. Those consequences would have a disabling effect on airport narcotics surveillance, which has proved to be a highly successful means of interdicting drug smugglers.

Since 1974, the Drug Enforcement Administration, in conjunction with state and local law enforcement agencies, has operated a drug courier surveillance program at numerous airports throughout the nation in order to stem the flow of narcotics from abroad and between the states.[23] The DEA's airport nar-

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[23] The program is operated by the DEA at approximately 30 airports across the nation, and state and local law enforcement agencies operate an equal number of similar programs on their own.

cotics detection program plays an important role in the agency's overall drug enforcement efforts, because it provides the DEA with the opportunity to intercept narcotics at a point in the distribution chain above the level that can be reached by more traditional undercover operations. Agents participating in the DEA's programs are trained to distinguish narcotics couriers, or "mules," from legitimate travelers by relying on the type of circumstantial evidence that was present in this case and that has been deemed indicative of narcotics trafficking by this Court and the courts of appeals. If the court of appeals' two-part reasonable suspicion test were endorsed by this Court, that test would outlaw a large percentage of the stops of suspected narcotics traffickers who pass through the nation's airports. That consequence would seriously damage the powerful national interest in bringing narcotics trafficking to a halt.[24]

In the final analysis, the two-part test devised by the Ninth Circuit is reminiscent of the multi-part *Aguilar-Spinelli* test that the Court once applied in making probable cause determinations. See *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969). In *Illinois* v. *Gates*, *supra*, the Court rejected that test in favor of a "totality-of-the-circumstances" approach to probable

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[24] See *United States* v. *Montoya de Hernandez*, 473 U.S. at 538; *Florida* v. *Royer*, 460 U.S. at 508 (Powell, J., concurring); *id.* at 513 (Blackmun, J., dissenting); *United States* v. *Mendenhall*, 446 U.S. at 561-562 (opinion of Powell, J.); *United States* v. *Berry*, 670 F.2d 583, 602 (5th Cir. 1982) (en banc) (noting "the exceedingly strong government interest in ending trafficking in drugs"); S. Rep. 98-225, 98th Cong., 1st Sess. 255 (1983) ("[i]llicit trafficking in drugs is one of the most serious crime problems facing the country").

cause. The Court did so because the *Aguilar-Spinelli* test did not permit "a balanced asesssment of the relative weights of all the various indicia of reliability (and unreliability)" and "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that simply cannot sensibly be divorced from the other facts presented to the magistrate." *Illinois* v. *Gates*, 462 U.S. at 234-235 (footnote omitted).[25] The two-part reasonable suspicion test adopted by the court below is subject to precisely the same criticism: Its overly mechanical formulation and application will impede, rather than assist, clarity of analysis of the strength of the evidence supporting a narcotics officer's judgment. As this case shows, the court of appeals' test obscures the probative force of evidence that, when viewed as a whole and in a commonsense fashion, amply justified the agents' suspicions that respondent's curious four-day journey between Honolulu and Miami had a criminal purpose.

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[25] Significantly, in adopting a totality-of-the-circumstances approach for probable cause, *Gates* relied on *Cortez*, which had endorsed that approach for reasonable suspicion. *Illinois* v. *Gates*, 462 U.S. at 231-232 (quoting *United States* v. *Cortez*, 449 U.S. at 418).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 87-1295

In The

Supreme Court of the United States

October Term 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDREW SOKOLOW,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ANDREW SOKOLOW

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35pp

QUESTION PRESENTED

Whether a court must require more than the unsubstantiated conclusions of a federal drug enforcement agent in determining the existence of reasonable suspicion to justify a seizure of a person?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–Continued

TABLE OF AUTHORITIES–Continued

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BRIEF FOR RESPONDENT ANDREW SOKOLOW

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (Pet. App. 1a-2a) and a supplemental petition for rehearing was also denied on May 11, 1988 (J.A. 67). A petition for writ of certiorari was filed on February 2, 1988 and the petition was granted on June 6, 1988. The Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On July 22, 1984 United Airlines ticket agent John Birt made a cash sale of two round trip tickets scheduled to depart from Hawaii that day for Miami via Chicago with an open return. The sale had been made to a man dressed in a black jumpsuit and wearing gold jewelry, who was accompanied by a woman. In payment for the tickets, Mr. Birt took $2100 from a roll of twenty dollar bills approximately twice that size handed to him by the man, and returned the balance of approximately $2,000.00. The tickets were made out to Andrew Kray and Janet Norian. At the request of Mr. Birt, the man gave him a call-back telephone number. The man appeared to the ticket agent to be nervous at the time of the ticket sale, just prior to the man catching his flight. Mr. Birt notified the Honolulu Police Department of the transaction. J.A. 15, 18, 41, 42.

Based upon this information alone, Officer McCarthy of the Honolulu Police Department and Airport Task Force notified the Drug Enforcement Administration

(DEA) and thereby initiated a Federal and State investigation. The DEA began by determining that the phone number given to Mr. Birt was listed to a Karl Herman of 348-A Royal Hawaiian Avenue, Honolulu, Hawaii. J.A. 15, 18-19, 42, 46. Two days later, Officer McCarthy called the phone number and had John Birt listen to a taped message. Mr. Birt confirmed that the voice on the taped message belonged to the man who purchased the tickets for Miami thereby verifying that the call back number left by Andrew Kary was correct. J.A. 15-16, 42-43, 44, 45-46. No attempt was made to discover whether Andrew Kray and Karl Herman were living as roommates at the Royal Hawaiian address.[1]

On July 24, 1984, Officer McCarthy was informed that return reservations to Hawaii had been made in the name of Kray and Norian scheduled to arrive in Honolulu on July 25, 1984 with stopovers in Denver and Los Angeles. J.A. 16, 19, 43. Agents in Los Angeles were alerted. They observed that Sokolow appeared to by very nervous and "was looking all around the waiting area," but made no attempt to speak with him. J.A. 43, 44.

At 6:30 p.m. on the following day, Andrew Sokolow and his companion deplaned in Honolulu. Having no checked luggage consistent with their brief visit to Miami, they went directly to the street level taxi stand. J.A. 16, 19. They were prevented from entering a taxi by a large number of Federal officers and DEA agents who

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[1] Following Andrew Sokolow's (Andrew Kray) arrest, the agents learned that Mr. Sokolow and Karl Herman were roommates at the Royal Hawaiian Avenue address. J.A. 47.

grabbed and surrounded both Mr. Sokolow and his companion, forced them back to the sidewalk and sat them down. Pet. App. 47a; J.A. 31-32, 52-53.

After physically removing Mr. Sokolow from the taxi stand area, DEA Agent Kempshall then asked Mr. Sokolow for his plane ticket and identification. Having neither, Mr. Sokolow informed Agent Kempshall that his name was Andrew Sokolow and that he was traveling under his mothers maiden name, "Kray." He told the DEA agent that the tickets had been purchased for him by a man named "Marty." J.A. 16, 19, 55.

At 6:41 p.m., Andrew Sokolow and his companion were taken to the DEA office approximately 300 yards away and their luggage turned over to a U.S. Customs dog handler. Thirteen minutes later, the luggage was examined by Donker, a narcotics detection dog, who alerted to a brown shoulder bag. Andrew Sokolow was arrested. J.A. 16, 17, 19, 20. A search warrant was applied for based upon the dog's response. At 8:15 p.m., a federal warrant authorizing the search of the brown shoulder bag for narcotics only was issued. J.A. 11-12.

While waiting for the warrant, Andrew Sokolow was warned of his rights and he refused to make a statement. However, he was overheard on the phone to his attorney to say that he was in big trouble. J.A. 20. During this time, a woman was brought into the same area on an unrelated matter and she told the DEA agents that she knew Andrew Sokolow to have previously purchased a small amount of heroin from her supplier. Pet. App. 58a.

At 8:55 p.m., the shoulder bag was searched with negative results as to narcotics. During the search the

police also decided to recover airline tickets and found them to be in the name of Andrew Kray and James Wodehouse and receipts for Miami hotels. Pet. App. 58a.

Half an hour later, Janet Norian was released. Mr. Sokolow was not released until sometime after that. None of the luggage was released. J.A. 20, 21.

Donker was brought back to examine the luggage for a second time. At 9:30 p.m., approximately three hours after Mr. Sokolow had been seized and at least 35 minutes after failing to discover narcotics in the shoulder bag, Donker alerted to a medium sized Louis Vuitton carry-on bag to which he had sniffed earlier without alerting thereto. An unsuccessful attempt was made to obtain a second search warrant. J.A. 20.

On July 26, 1984 at 7:45 a.m., approximately 13 hours after Mr. Sokolow's seizure, another narcotics detection dog, Lady, was brought in by the U.S. Customs. This dog also alerted to the Louis Vuitton bag. A search warrant was obtained and 1000 grams of cocaine were discovered as a result of the search. J.A. 20.

Andrew Sokolow moved to suppress the evidence. Without identifying exactly when Mr. Sokolow was first seized, the United States Magistrate found that "the initial stop" of Mr. Sokolow was based upon elements of the "drug courier profile" and therefore constituted a reasonable and articulable basis for the initial stop. These elements included 1) payment for roundtrip tickets in cash; 2) the cash came from a roll of twenty dollar bills; 3) the tickets were for a brief trip to Miami which is "a known source city for drugs"; 4) Andrew Sokolow was travelling

under an assumed name; 5) Mr. Sokolow and his traveling companion did not check in any luggage and; 6) Mr. Sokolow was unable to produce either his ticket or any identification for Agent Kempshall. The Magistrate also found that all subsequent searches and seizures were reasonable and based upon probable cause and recommended denial of the motion. Pet. App. 60a-62a.

Mr. Sokolow filed an objection to the Magistrate's Report. The District Court conducted a de novo review of the motion and denied the motion based upon findings essentially identical to the findings of the Magistrate except that the District Court did hold that the initial contact between Agent Kempshall and Mr. Sokolow did not constitute a seizure implicating the Fourth Amendment. Pet. App. 52a-55a.

Mr. Sokolow entered a plea of guilty to the charges contained in the indictment, reserving the right to appeal the decision on the motion to suppress evidence. Mr. Sokolow was adjudged guilty and sentenced accordingly. J.A. 64, 65. An appeal was then taken to the Ninth Circuit Court of Appeals. J.A. 5.

Prior to rendering a decision, the Ninth Circuit Court of Appeals remanded the case to the District Court for specific findings of fact regarding the initial contact between Mr. Sokolow and Agent Kempshall and certain subsequent events. Pet. App. 50a-51a. In response, the District Court found that; 1) when the Federal agents first approached Mr. Sokolow, they took hold of Mr. Sokolow's arm and Mr. Sokolow reasonably believed that he was not free to leave; 2) the seizure of Mr. Sokolow was based on a "founded suspicion"; 3) Mr. Sokolow was

taken to the DEA office without his consent; 4) the detention of Mr. Sokolow in the office was the least invasive means for the DEA to verify or allay their suspicions. Pet. App. 47a-49a.

Upon review of the evidence presented at the suppression hearing and the District Court's findings of fact, the Court of Appeals reversed the decision of the District Court. Pet. App. 34a-46a. Concluding that the initial contact between Agent Kempshall and Mr. Sokolow unquestionably exceeded the permissible limits of a consensual encounter, the majority opinion held that a seizure implicating Mr. Sokolow's Fourth Amendment rights occurred at the moment that the agents grabbed him by the arm and sat him down on the sidewalk. Pet. App. 39a. The majority opinion further held that at the time of Mr. Sokolow's seizure, the facts regarding his conduct, which the agents found to have matched their DEA "drug courier profile," failed to establish a reasonable and articulable suspicion that he was engaged in criminal activity. Pet. App. 40a-43a. As such, the Court of Appeals concluded that the seizure of Mr. Sokolow violated the Fourth Amendment. Pet. App. 44a. Judge Wiggins dissented. Pet. App. 44a-46a.

A rehearing was granted at the request of the Government and a second amended opinion was issued. Again the Court of Appeals rejected the Government's arguments and reversed the decision of the District Court. Pet. App. 1a-33a. The majority opinion of the Court of Appeals reaffirmed the established principle that a limited seizure requires a reasonable suspicion that the person detained is engaged in criminal activity and

rejected the Government's suggestion that it automatically approve stops based upon a "drug courier profile" informally created by the DEA. Pet. App. 7a-21a. Judge Wiggins again dissented. Pet. App. 21a-33a.

SUMMARY OF ARGUMENT

The premature seizure of Mr. Sokolow by a DEA agent cannot be justified by mere reference to an assemblage of characteristics appearing in a "drug courier profile." Irrespective of their inclusion in a profile or their subjective characterization by an agent as being suspicious, the facts available to the agent at the time of the seizure must still give rise to a reasonable suspicion of criminal behavior. The articulated facts in this case fall far short of that mark. This is not a case in which law enforcement officers carefully developed their investigation based upon reliable information and then acted in a manner consistent with that information. Instead, the agents in this case took a bare handful of facts and manufactured suspicion out of their unverified suppositions. Rather than test these broadly drawn conclusions for reasonableness through prudent investigative techniques, the agents immediately effected a physical seizure of Mr. Sokolow in the street, outside the baggage claim area, in front of hundreds of people in a manner which cannot be said to be the least intrusive available to the agents.

This is one of the many cases arising out of the use of a "drug courier profile" by the Drug Enforcement Agency and represents a gross misuse of that investigative tool. The characteristics included in the profile and attributed to Mr. Sokolow prior to the seizure are "suspicious"

solely as a result of their inclusion in this informally compiled profile. The existence of characteristics which are not objectively suspicious cannot form the basis for a seizure merely because of their inclusion in the drug courier profile. The suspicions must be based upon articulable facts and found to be reasonable. To hold otherwise would be to enlarge upon the present limitations of an investigative detention to include seizures based upon the drug courier profile irrespective of the existence of reasonable suspicion. The requirement that the suspicion be both reasonable and that the factual basis be articulable preserves for the courts the power and responsibility of critically evaluating the justification for the seizure. It is not enough for the courts to rely upon the conclusory characterization by an agent that apparently innocent facts are suspicious and suggest criminal conduct. If such were the case, the scope of Fourth Amendment protections would be left to the discretion of law enforcement officers and the role of the courts would become an empty formality, dissimilar, only in name, from the open warrants out of which the Fourth Amendment protection arose.

Being nervous before a flight and during a layover, paying for tickets with cash, staying in Miami for a brief visit, having only carry-on luggage for a short trip, and living at an address where the phone number is listed to a roommate does not give rise to a reasonable suspicion that a person is engaged in criminal activity. At the time of the seizure of Mr. Sokolow, Agent Kempshall's information consisted only of these facts which, if suspicious at all, were so only by virtue of their inclusion in the drug courier profile. At this point, Agent Kempshall could have approached Mr. Sokolow and engaged him in consensual conversation in order to further investigate the

matter. If, as a result of that conversation, Agent Kempshall discovered objectively suspicious facts, sufficient cause might have existed for an investigative detention. Unfortunately, rather than pursue this prudent course of investigation, Agent Kempshall chose to engage in more intrusive measures and immediately effected a seizure of the person, thereby upsetting the delicate balance that must be maintained between the Fourth Amendment rights of individuals and the demands of law enforcement.

ARGUMENT

THE SEIZURE OF ANDREW SOKOLOW WAS MADE IN VIOLATION OF THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST UNREASONABLE SEIZURES.

The seizure of Andrew Sokolow by Agent Kempshall was without sufficient legal justification to overcome the protections of the Fourth Amendment. Based upon the information available to Agent Kempshall at the time of the seizure, there may have been an adequate basis for further nonintrusive investigation, but clearly there was insufficient factual basis to justify a Fourth Amendment seizure.

A. AT A MINIMUM, A SEIZURE MUST BE BASED UPON A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.

A seizure implicating the Fourth Amendment occurs whenever a law enforcement officer, by means of physical force or show of authority, has in some way restrained

the liberty of a citizen. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In *Terry*, it was the officer's grabbing and turning of the suspect's body as he stood on the sidewalk that constituted the seizure. Other forms of physical restraint which have been found to constitute a Fourth Amendment seizure include the blocking of an individual's path or otherwise intercepting him to prevent his progress in any way,[2] or physical contact or a request to move in some manner.[3]

The fact that a seizure implicating the Fourth Amendment occurred at the moment of DEA Agent Kempshall's initial contact with Mr. Sokolow cannot be disputed. Agent Kempshall and a number of other federal officers surrounded Mr. Sokolow at the airport taxi area soon after his deplaning, yelled for other agents to get his companion, grabbed his arm, thus preventing his entering a taxi and physically removed him from the taxi area to the walkway and sat him down. Other agents did the same with Mr. Sokolow's female companion. The initial encounter between Agent Kempshall and Mr. Sokolow thus immediately triggered the protections of the Fourth Amendment.

A seizure having been effected, it became incumbent upon the government to demonstrate that the seizure was justified. As a limited exception to the general rule that seizures of the person require probable cause, the investigative detention exception is premised upon overriding

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[2] *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. Unit B 1982); *United States v. Puglisi*, 723 F.2d 779, 783 (11th Cir. 1984).

[3] *United States v. Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988).

law enforcement interests that are served by the limited intrusion upon Fourth Amendment protections. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968). Rather than requiring probable cause as with an arrest, this limited exception allows for brief detentions supported by articulable facts which would create a reasonable suspicion that a suspect is engaged in criminal activity. *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968). Even a momentary detention must be supported by reasonable, objective grounds supporting a belief of criminal behavior. *Florida v. Royer*, 460 U.S. at 498, citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980). The belief must be supported by fair inferences from the objective facts, and not upon inchoate and unparticularized suspicions or hunches. *Terry v. Ohio*, 392 U.S. at 27. In addition, any subsequent examination of the reasonableness of the officer's suspicion of criminal activity must be based solely upon the facts known to the investigating police officer at the time of the seizure. *Terry v. Ohio*, 392 U.S. at 22; *United States v. Erwin*, 803 F.2d 1505 (9th Cir. 1986); *United States v. Garvin*, 576 F.Supp. 1110, 1114-1115 (N.D. Ill. E.D. 1983); *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B. 1981). Since the justification for this exception is the overriding need of law enforcement, it is only reasonable then that the intrusion upon Fourth Amendment interests therefore be limited to the actual requirements of that need. So, while the scope of the intrusion allowed by this exception will depend upon the particular facts and circumstances of each case, it is clear that the investigative methods

employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion of criminal activity. *Florida v. Royer*, 460 U.S. at 500; *United States v. Brignoni-Ponce*, 442 U.S. at 881-882; *Adams v. Williams*, 407 U.S. at 146. Furthermore, it is the state's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope to satisfy the conditions of an investigatory seizure. *Florida v. Royer*, 460 U.S. at 500.

At the time of Agent Kempshall's seizure of Mr. Sokolow, the agent knew only of the following facts: Mr. Sokolow had appeared nervous when he purchased his airline tickets, he had paid for his tickets in cash, he traveled to Miami and stayed for less than two days, he had appeared nervous during the layover in Los Angeles on his return trip, and he lived at an address where the telephone number was listed under another person's name.

These facts simply are not objectively suspicious of criminal behavior. While these facts might lead a trained officer of the law to have a hunch that a crime is afoot, such a hunch based solely on his opinion that certain characteristics are consistent with those which the agent believed were common to airport narcotics traffickers is wholly insufficient to justify an invasion of a constitutionally protected interest. Without attempting to verify or dispel his suspicion that Mr. Sokolow may be a drug trafficker by some less intrusive means such as a consensual conversation with Mr. Sokolow, Agent Kempshall decided to effect an immediate seizure of Mr. Sokolow at a place and in a manner that was unwarranted. The facts upon which the agent's action was based fell far short of

giving rise to a reasonable and articulable suspicion that Mr. Sokolow was engaged in criminal behavior. As a result, the seizure of Mr. Sokolow was made in blatant violation of the reasonableness requirement of the Fourth Amendment.

B. THE DRUG COURIER PROFILE CANNOT PROVIDE REASONABLE SUSPICION TO JUSTIFY AN INVESTIGATIVE STOP.

At the supression hearing, Agent Kempshall was asked on direct examination to explain why he suspected that Mr. Sokolow may have been transporting drugs when he stopped him curbside at the airport. He responded that the totality of the facts known to him at the time of the stop "had all the classic aspects of a drug courier." J.A. 59. In spite of this testimony, the Government's Brief disingenuously denies that the "drug courier profile" was used in the present case and scrupulously avoids the use of the term. However, the cases upon which the Government relies in support of its position on reasonable suspicion and Agent Kempshall's characterization of the facts makes the profile's application in this case apparent.

The drug courier profile is an informally compiled abstract of characteristics thought to be typical of persons carrying illicit drugs.[4] It is an abstract that does not allow for effective judicial review of the reasonableness of the seizure and is without empirical validation. The agents using the profile act under the assumption that some members of the general air traveling public carry illegal

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[4] *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980).

drugs. Without prior knowledge of facts suggestive of criminal behavior by a particular person, the agents seek out those air travelers whose conduct conforms with characteristics of the profile. Hence, a person engaged in entirely innocent behavior may instead become suspect to an investigating agent on the basis of the agent's "trained eye" and upon his own perception and conclusion that the person's conduct conforms with certain characteristics of narcotics traffickers.

Reliance by the courts upon characteristics of the drug courier profile as a basis for determining reasonable suspicion is fraught with dangers. The characteristics themselves are not objectively suspicious of criminal behavior, the validity of the profile has never been established, and the profile itself has been proven to have no predictive value in the investigation of airport narcotics trafficking. Instead, the profile merely reflects a subjective belief of law enforcement officers regarding drug couriers.

Judicial Review of Subjective Belief: In its determination of reasonable suspicion, the courts should not be satisfied with relying upon the conclusory characterizations by an agent that apparently innocent facts are suspicious and suggest criminal conduct. The actions of law enforcement officers must be such that it can be reviewed judicially by an objective standard. *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2nd Cir. 1980). Although the courts must review the facts based upon the fair inferences in light of the agent's experience, *Terry v. Ohio*, 392 U.S. at 30, "the fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean

that an agent's perceptions are justified by the *objective* facts." *United States v. Buenaventura-Ariza*, 615 F.2d at 36; *United States v. Black*, 675 F.2d 129, 140 (7th Cir. 1982) (dissenting opinion of Swygert, Senior Circuit Judge). The requirement that there be specific, objective and articulable reasons for subjecting a person to an investigatory stop is intended to prevent an officer from freely acting on his own groundless suspicions. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

To place undue reliance upon the agent's perceptions and conclusions would be to completely surrender the court's power and responsibility of critically evaluating whether a seizure is justified by a suspicion that is reasonable and a factual basis that is articulable. *United States v. Buenaventura-Ariza*, 615 F.2d at 37. Mechanical acceptance by the courts of the agent's conclusions would subjugate the scope of the Fourth Amendment to the discretion of law enforcement officers, leaving the role of the courts as an empty formality.

Lack of objective suspicion: Use of the drug courier profile in the determination of reasonable suspicion has been subject to judicial criticism due to the fact that the majority of the characteristics within the profile are not objectively suspicious of criminal behavior. Common characteristics such as arrival from a "source city" such as Miami, having little or no luggage, the cash purchase of airline tickets, or nervousness at the airport are characteristics which "describe a very large category of presumably innocent travelers." *Reid v. Georgia*, 448 U.S. 438, 441 (1980). These characteristics are as applicable to law-abiding citizens as to suspect individuals. *United States v. Berry*, 670 F.2d 583, 599 (5th Cir. Unit B 1982); *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980). They are also the characteristics attributed to Mr. Sokolow as a justification for his seizure.

The courts have criticized the profile element of "source city" specifically as providing no objective suspicion of criminal activity. A review of testimony by DEA agents in drug courier profile cases has revealed that the agents have characterized almost every major city in the United States as being a "source city," a city through which drug traffickers pass or a major narcotics distribution center. See e.g. *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980); *United States v. Andrews*, 600 F.2d 563, 566-567 (6th Cir. 1979); *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983). *Reid v. Georgia* was especially critical of the use of the "source city" factor as a profile element to identify suspected drug traffickers. In that case, the Court found that a large percentage of the air traveling population "would be subject to virtually random seizures" if travel from a "source city" provided reasonable suspicion of criminal behavior. 448 U.S. at 441.

The *Reid* court voiced the same criticism of the profile factor of having little or no luggage. The cases show that couriers exhibited every possible behavior concerning luggage including no luggage, little luggage, carry-on luggage only, checked luggage only and both carry-on and checked luggage in relatively equivalent numbers. See e.g. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Elmore*, 595 F.2d 1036 (5th

Cir. 1979), *cert. denied*, 447 U.S. 1082 (1980); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978).[5]

The profile factor of nervousness also fails to provide any objective suspicion of criminal behavior due to the countless innocent reasons why air travelers may be nervous before or after a flight. See e.g. *United States v. Buenaventura-Ariza*, 615 F.2d at 36; *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983). Given the fact that this profile element is based upon the subjective perceptions of investigating agents or airline personnel, the courts have cautioned that in reviewing nervousness as a profile factor, "a court must, of course, attempt to distinguish between natural, innocent nervousness and nervousness resulting from 'preexisting fear in the mind of a person possessing illegal drugs.' " *United States v. Berry*, 670 F.2d 583, 596 n.11 (5th Cir. Unit B 1982), quoting from *United States v. Turner*, 628 F.2d 461, 466 (5th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

The profile's lack of objective suspicion has thus led to the generally accepted conclusion that the exhibition of drug courier profile characteristics alone is insufficient to support a finding of reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 440-441 (1980); *United States v. Morin*, 665 F.2d 765, 768 n.9 (5th Cir. 1982); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2nd Cir. 1980); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979).

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[5] See also Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 Boston U. L. Rev. 843, 907-908 (1985).

Lack of Validation: Since the creation of the profile in the early 1970's, the government has never demonstrated that the profile accurately distinguishes drug couriers from innocent travelers. It has never provided objective proof of the validity of the profile's characteristics.[6]

In marked contrast to its informal drug courier profile, the government's airline "hijacker profile" was compiled on the basis of extensive studies of known hijackers by a task force which utilized statistical, sociological and psychological data and techniques. Significantly, the profile was tested systematically to measure its validity. The result was a reliable profile consisting of objective characteristics which sharply differentiates potential hijackers from the air-traveling public. The profile has remained consistent over the years and has been an effective measure in isolating potential hijackers.[7] The government's drug courier profile has never been subjected to any comparable process of validation. Absent such validation, any reliance on the profile is untenable.

The general absence of validation appears in this case as a total lack of substantiation for Agent Kempshall's conclusory opinion that Mr. Sokolow's actions were suspicious. See e.g. *Taylor v. Commonwealth*, 369 S.E.2d 423, 423 n.1 (Va. App. 1988). Even though Agent Kempshall testified as to his training and experience in airport narcotics trafficking, he failed to relate how such training and experience supported his suspicions based upon the

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[6] Cloud, 65 Boston U. L. Rev. at 858.

[7] Cloud, 65 Boston U. L. Rev. at 873-874, 877, 879.

particular facts of this case. The mere blanket assertion of training and experience does not automatically validate the hunches of an investigating agent.

Lack of predictive validity: Empirical data demonstrates that the drug courier profile has doubtful predictive value in identifying potential drug traffickers.[8] Only a small percentage of travelers stopped in profile cases are ever arrested. A majority of the characteristics fail to describe 90% of drug couriers. Only 10% or less of the defendants stopped exhibited the profile characteristics of being young, casually dressed, making last minute airline reservations and last minute ticket purchases, staying for only brief visits, having an unusual or circuitous itinerary, deplaning last, arrival in the early morning hours, or concealing a traveling companion. The characteristics of cash purchase of airline tickets, nervousness before contact by police and traveling under an alias were exhibited by less than 50% of the couriers. A review of the cases also reveals that even the characteristics involving luggage and "source city," which are the most common, lack any predictive validity due to their excessive breadth. See *supra*.

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[8] Cloud, 65 Boston U. L. Rev. at 886-920. The Cloud study analyzed 90 reported judicial opinions involving 103 defendants. The opinions were decided by 27 different state and federal courts during 1975 through 1983. An initial pool of approximately 200 reported opinions involving use of the drug courier profile was pared to delete cases where investigations and observations by DEA agents did not occur in airport terminals and where investigations occurred over a number of days. From the remaining pool of opinions, the subject cases were randomly selected to produce a target population of 100 defendants.

Lessening the profile's predictive value further is the fact that the profile varies from airport to airport. *United States v. Berry*, 670 F.2d at 598 n.17. It "tends to become blurred, as though the characteristics are shaped to fit the conduct instead of the other way around," *United States v. Garvin*, at 1112 n.1, and its variety of traits "defies any attempt at mechanical application[.]" *United States v. Knox*, 839 F.2d 285, 289 n.2 (6th Cir. 1988), petition for cert. filed, (No. 87-1927).

C. THE DRUG COURIER PROFILE IS PROPERLY USED ONLY AS AN INVESTIGATIVE TOOL AND NOT AS A SUBSTITUTE FOR REASONABLE SUSPICION.

The shortcomings of the drug courier profile which prevents its use to establish reasonable suspicion to justify a Fourth Amendent seizure do not necessarily prevent its use by law enforcement officers as an investigative tool. Although the police may not lawfully seize someone who merely exhibited a combination of profile characteristics, good police work might suggest the close surveillance of such person. The profile can usefully serve to "guid[e] law enforcement officers toward individuals on whom the officers should focus their attention in order to determine whether there is a basis for a specific and articulable suspicion that the particular individual is smuggling drugs." *United States v. Berry*, 670 F.2d at 600 n.21. If the officer's focus leads to the belief that further investigation is necessary, it is possible for him to engage in a non-intrusive encounter with the individual by approaching the individual and ascertaining whether the person is willing to cooperate and to then engage in consensual conversation. *Id*. This

procedure allows the officer to verify or dispel his suspicions through employment of the least intrusive means available, thereby conducting his investigation within the permissible limits of the Fourth Amendment. *Florida v. Royer*, 460 U.S. at 500; *United States v. Brignoni-Ponce*, 422 U.S. at 881-882.

This application of the drug courier profile has been widely employed. Cases involving the drug courier profile which have required judicial review illustrate the proper use of the profile as an investigative tool for law enforcement officers. The profile serves only to trigger law enforcement officers into investigating suspected drug traffickers by engaging in non-intrusive surveillances or consensual encounters with the suspected narcotics traffickers. No seizures are effected until objective facts suggestive of criminal activity are discovered during the course of the consensual encounters which serve to verify the officer's suspicions and to thereby justify a seizure of the suspect. The cases most commonly involve the discovery and confirmation of the suspect's use of an alias,[9] the uttering of untruthful, inconsistent, misleading or incriminating statements regarding the suspect's

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[9] *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984); *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Palen*, 793 F.2d 853 (7th Cir. 1986).

itinerary or travel companion,[10] or conduct such as the suspect's flight from police during the consensual encounter.[11]

D. THE FACTS KNOWN TO AGENT KEMPSHALL AT THE TIME OF HIS SEIZURE OF MR. SOKOLOW DID NOT GIVE RISE TO A REASONABLE AND ARTICULABLE SUSPICION THAT MR. SOKOLOW WAS ENGAGED IN CRIMINAL ACTIVITY.

Irrespective of their inclusion in a profile of drug couriers or their subjective and conclusory characterization as suspicious by an agent, the facts available to the agent at time of seizure must still give rise to a reasonable suspicion of criminal behavior. A lawful seizure requires that an objective review of the facts lead to the conclusion that the specific conduct of the person seized created a reasonable suspicion that the person was engaged in criminal activity. In the present case, the facts known to Agent Kempshall failed to meet the constitutional requirements of a lawful seizure.

Agent Kempshall effected a seizure of Mr. Sokolow solely on the basis of his knowledge that (1) Mr. Sokolow made a cash purchase of airline tickets just prior to

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[10] *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984); *United States v. Poitier*, 818 F.2d 679 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988); *United States v. Gonzales*, 842 F.2d 748 (5th Cir. 1988); *United States v. Pantazis*, 816 F.2d 361 (8th Cir. 1987); *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B 1981); *United States v. Borys*, 766 F.2d 304 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

[11] *United States v. Haye*, 825 F.2d 32 (4th Cir. 1987)

departure and appeared nervous during the ticket purchase, (2) he and a companion traveled to Miami, via Chicago, where they stayed for less than two days, (3) they returned to Honolulu via Denver and Los Angeles and during the layover in Los Angeles, Mr. Sokolow appeared nervous, (4) both Mr. Sololow and his companion had only carry-on luggage, and (5) Mr. Sokolow lived at an address where the telephone was listed under another person's name.

Reid v. Georgia[12] involved facts comparable to the present case. Reid was seized by a DEA agent after deplaning at the Atlanta airport on the basis that (1) he had traveled to Fort Lauderdale, a source city for cocaine,[13] (2) he arrived in the early morning when law enforcement activity was diminished, (3) he had no luggage other than a carry-on shoulder bag, and (4) he had occasionally glanced at another male with a shoulder bag as they deplaned down the concourse, which appeared to the agent that they were trying to conceal the fact that they were traveling together.

The *Reid* court found that the facts regarding travel to Fort Lauderdale, arrival in the early morning and presence of only carry-on luggage described presumably innocent behavior and provided no basis for the agent to reasonably suspect Reid of criminal activity. Only Reid's conduct of glancing at his companion as walked down the concourse was found to relate to Reid's particular

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[12] 448 U.S. 438 (1980).

[13] The agent's investigation of Reid's airline ticket soon after the stop also showed that Reid had visited Fort Lauderdale for only one day.

conduct. However, the Court concluded that such particularized conduct could not have led the agent to suspect Reid of wrongdoing. On the basis of the totality of the observed circumstances, the Court concluded that as a matter of law, there were insufficient facts to support a reasonable suspicion of criminal activity. The agent's belief "was more an 'inchoate and unparticularized hunch [citation omitted] than a fair inference in the light of his experience." 448 U.S. at 441.

The conclusion reached on the facts in *Reid* is similarly warranted under the present facts. The fact that Mr. Sokolow traveled to Miami was behavior which was entirely innocent. It does not constitute particularized conduct on the part of Mr. Sokolow. His visit to Miami is not a fact which objectively supports any reasonable inference that he was engaged in criminal behavior. Similarly the fact that he only had carry-on luggage fails to give rise to a reasonable suspicion. Rather than raising any reasonable inference of criminal activity, this fact was instead entirely consistent with Mr. Sokolow's brief visit. If anything, his possession of many pieces of luggage would have been more suspect since it would have been inconsistent with his short stay.

Although the factors of Mr. Sokolow's cash purchase of his airline tickets and his nervousness may point to his particularized conduct, such conduct provided no basis for any inference that Mr. Sokolow was engaged in criminal activity. According to the Government, these facts created a suspicion that Mr. Sokolow was attempting to conceal his identity. At most, these facts only created a subjective belief or hunch.

In fact, if the government's suspicion that Mr. Sokolow was trying to conceal his identity had been reasonable, it was irreconcilable with the fact that Mr. Sokolow had left a correct call-back number for the ticket agent.[14] The discrepancy that the agents believed existed between the name listed to the phone number and the name left with the ticket agent could easily have been dispelled during the two days the agents had to investigate the case before Mr. Sokolow returned to Hawaii. Had they made the effort, they would have discovered without intrusion upon constitutionally protected interests that the listed name belonged to Mr. Sokolow's roommate. It is also not uncommon for individuals to use aliases in travel for reasons ranging from business to extra-marital affairs and even concealing a person's national origin or religious belief.

The fact that the DEA agent at the Los Angeles airport described Mr. Sokolow as appearing nervous during the layover was not a specific and articulable fact to support an inference that criminal behavior was afoot. All that was presented in this regard was the conclusory opinion of Agent Kempshall that the description given to him by others of Mr. Sokolow's appearance in Los

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[14] See e.g. *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B 1981); *United States v. Espinosa-Guerra*, 805 F.2d 1502 (11th Cir. 1986); *United States v. Knox*, 839 F.2d 285, 290 (6th Cir. 1988); where agents verified the call-back numbers provided by the defendants prior to effecting a seizure. In these cases, persons answering at the numbers denied any knowledge of the defendants, thereby justifying an inference of an attempt by the suspects to conceal their identity and therefore of criminal behavior.

Angeles and in Honolulu gave rise to a subjective belief that Mr. Sokolow was nervous and therefore suspicious. Despite the agent's conclusion, the record in the present case is wholly devoid of any objective facts which support any reasonable inference that Mr. Sokolow's perceived nervousness was the result of his being a drug trafficker. Without such objective facts, Mr. Sokolow's nervousness did not provide any reasonable and articulable suspicion of criminal behavior.

Even when viewed as a whole, the facts known to Agent Kempshall at the time of his seizure of Mr. Sokolow did not give rise to a reasonable and articulable suspicion that Mr. Sokolow was engaged in narcotics trafficking. If, as the Government's Brief contends, the drug courier profile was not applied in this case, then the inferences which Agent Kempshall made to characterize the activities of Mr. Sokolow as suspicious are without even the minimal support that the profile might provide. The facts in Mr. Sokolow's case were merely sufficient to provide the government with an "inchoate and unparticularized hunch" that Mr. Sokolow may have been involved in drug trafficking. The Government should have approached Mr. Sokolow and engaged him in consensual conversation in order to further investigate their hunch. If, during the course of that conversation, the government discovered objectively suspicious facts, sufficient cause might have then existed for an investigatory detention. Instead of pursuing this prudent course of investigation, the government chose to immediately effect a seizure of Mr. Sokolow, thereby crossing the line between the demands of law enforcement and the Fourth Amendment rights of citizens.

To condone the government's actions in Mr. Sokolow's case would be to enlarge upon the present limitation of an investigative detention to include seizures based upon the drug courier profile, irrespective of the existence of reasonable suspicion and to permit blanket approval of police seizures.

CONCLUSION

The Court of Appeals held that the seizure of Mr. Sokolow violated the Fourth Amendment because it was made in the absence of specific and articulable facts giving rise to a reasonable suspicion tha Mr. Sokolow was engaged in criminal activity. Based upon the foregoing reasons and principles, that decision should be affirmed.

Respectully submitted,

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Attorney for Respondent
Andrew Sokolow

SEPTEMBER 1988

No. 87-1295

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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13 pp

TABLE OF AUTHORITIES

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1. The principal holding of the court of appeals was that, in order to establish reasonable suspicion that a person passing through an airport is in possession of narcotics, the government must satisfy a strict two-part test. Under that test, a law enforcement officer must be able to identify at least one factor constituting direct evidence that a person is engaging in narcotics trafficking. The officer may then rely on circumstantial evidence indicating that smuggling is afoot only if he can substantiate those facts with empirical or statistical proof. As we showed in our opening brief (at 25-37), that overly technical standard is inconsistent with the Fourth Amendment

principles that this Court has repeatedly endorsed to guide the reasonable suspicion inquiry.

Respondent has not answered our arguments as to why the Ninth Circuit's test is erroneous. He has not pointed to any decision of this Court endorsing that type of technical approach to the reasonable suspicion determination, nor has he sought to reconcile that test with the settled Fourth Amendment principles discussed in our opening brief. Indeed, he makes no effort to defend the Ninth Circuit's two-part reasonable suspicion test.

Respondent does make a related argument, however. He claims (Br. 14-21) that the so-called "drug courier profile" should not be used to determine reasonable suspicion, because its characteristics fit a large number of innocent travelers as well as narcotics couriers. Although respondent seeks to characterize the issue in this case as turning on the validity of the "drug courier profile," we do not and have not relied on any such "profile" in this case. We argue simply that all the factors known to the agents, taken together, provided a reasonable basis for them to suspect that respondent was carrying narcotics when he returned to Honolulu from Miami.

To be sure, in deciding that the evidence justified detaining respondent briefly, the agents relied on their own experience and the experience of other agents, which suggested that factors such as using an alias, paying cash for tickets, and not checking luggage may justify the suspicion that an individual is transporting narcotics. But the agents' reliance on those factors did not reflect any mechanical application of a magical "profile"; it simply reflected the agents' ability to make judgments and draw inferences, based on their training and experience, that

might elude lay observers. See *Florida* v. *Royer*, 460 U.S. 491, 525-527 n.6 (1983) (Rehnquist, J., dissenting). It would be irrational to denigrate an agent's judgment on the ground that the facts known to him had been observed by other agents on other occasions and had proved to be reliable indicators of criminal acitvity. See *United States* v. *Cruz-Valdez*, 773 F.2d 1541, 1546-1547 (11th Cir. 1985) (en banc), cert. denied, 475 U.S. 1049 (1986) (footnote and citation omitted) ("[W]e frequently take into account matters of common sense or general knowledge. That knowledge changes with changing times and conditions. It is an unfortunate fact of modern life that juries and courts know more about commerce in controlled substances than they did a decade or more ago. We also know without specific evidence matters that have been proved in prior prosecutions."). It would make little sense for law enforcement agencies to train officers in narcotics enforcement if the agents could not use in the field what they have learned. Indeed, the practice of compiling and sharing information about the behavior of particular types of criminals can lessen the number of intrusions based on a hunch or random guesswork. A law enforcement practice of this type, therefore, is one that should be applauded, not discouraged, by the courts.

While respondent addresses several of the factors that the agents relied on, he makes the same error that the court of appeals made in its first opinion in this case (see U.S. Br. 7, 25): he considers the probative value of each factor separately. Any number of factors standing alone may appear entirely innocent. For example, not everyone who is young, who is casually dressed, who uses only carry-on luggage for a long journey, or who takes a trip to Miami is

a narcotics smuggler. But when all of those facts are taken together and considered along with other evidence in the case, they can be incriminating. For that reason, this Court's decisions require that all of the facts be considered in their entirety when determining if there is reasonable suspicion. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981).[1]

Moreover, this is not a case in which the only evidence to support the detention is "a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct" (*Sibron* v. *New York*, 392 U.S. 40, 78 (1968) (Harlan, J., concurring in the result)), even though that may be sufficient in some instances.[2]

[1] The lower court decisions cited by respondent (Br. 15-21) make the same point. They state that the mere fact that a person shares one or several characteristics with a drug courier does not establish reasonable suspicion that the individual is engaged in narcotics trafficking, a proposition with which we agree. But those decisions also hold that all of the facts known to an officer must be considered in their totality, and they agree that facts of the sort present in this case are probative. Finally, none demands that the government supply the type of empirical or statistical proof that the Ninth Circuit required in this case.

[2] Respondent claims (Br. 18) that the agents improperly relied on a "subjective perception[]" when they concluded that respondent was nervous both when he paid for his tickets and during his layover in Los Angeles on his return trip. Some observations—including ones that are very important to the determination of reasonable suspicion—are necessarily "subjective." It is for the court to determine whether the officers' subjective impressions were reasonable (and were not the product of post-hoc invention). In this case, respondent had the opportunity to cross-examine the agents at the suppression hearing and to try to persuade the district court to discredit their testimony. The district court, however, chose to believe the agents. Pet. App. 48a.

Respondent's large cash purchase of airline tickets, his apparent use of an alias, his long trip to a major cocaine distribution center, and his brief stay in that city are all objective facts from which an experienced narcotics officer could infer that respondent was involved in drug trafficking.[3]

2. Respondent argues (Br. 12-13, 21-23) that his detention was invalid because the agents did not pursue the least intrusive means available to them to determine whether respondent was in possession of drugs. In respondent's view, the agents should have simply approached and spoken with him, instead of forcibly detaining him, in order to verify their suspicions.

As support for that argument, respondent relies principally on the statement in *Florida* v. *Royer*, 460 U.S. at 500 (plurality opinion), that "the investigative methods employed [to effect an investigative detention] should be the least intrusive means reasonably available to verify or dispel the officer's sus-

[3] Respondent argues (Br. 26) that "[i]t is also not uncommon for individuals to use aliases in travel for reasons ranging from business to extra-marital affairs and even concealing a person's national origin or religious belief." We agree with respondent that some persons may use an alias when traveling for "business" reasons; after all, respondent did precisely that. It is also true that some persons may use an alias when traveling to parts of the world in which religious or ethnic persecution is an unfortunate fact of life. Miami, however, is hardly one of those areas. But what is most interesting about respondent's suggestion is his ability to devise a possible (even if highly unlikely) explanation for his use of an alias without first compiling the type of empirical or statistical proof that the Ninth Circuit demanded of narcotics agents. We ask only that law enforcement officers be allowed to draw the same (and in this case far more reasonable) type of commonsense inference from the facts known to them.

picions in a short period of time."[4] That statement, however, was directed toward the proposition that the *scope* of a detention must be reasonably limited to an officer's need to determine whether a crime may be afoot. *Royer* does not support the quite different proposition, on which respondent's argument rests, that a stop is *unjustified* if there is a less intrusive means available to an officer to verify or dispel his suspicions. In fact, the plurality in *Royer* upheld the initial detention of Royer without pausing to determine whether the officers had a less intrusive means of discovering whether he possessed narcotics. *Id.* at 502. *Royer* thus does not support respondent's claim that the agents' conduct in this case was improper.

Because there will be situations in which "the officer ha[s] to act quickly if he [is] going to act at all" (*Sibron* v. *New York*, 392 U.S. at 78 (Harlan, J., concurring in the result)), law enforcement authorities "must be allowed 'to graduate their response to the demands of any particular situation.'" *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983)). For that reason, the Court has cautioned against "indulg[ing] in 'unrealistic second-guessing,'" because "'creative judge[s], engaged in *post hoc* evaluations of police conduct[,] can almost always imagine some alternative means by which the objectives of the police might have been accomplished.'" *United States* v. *Montoya de Hernandez*, 473 U.S. at 542 (quoting *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985)).[5] Accordingly, while it is preferable for a narcotics agent to pursue the least intrusive method of investigation—and DEA agents are instructed to follow that approach—an agent does not act unlawfully by detaining a suspect based on reasonable suspicion that the suspect may be involved in a crime, rather than by merely speaking with him.

The facts of this case demonstrate why a "least intrusive means" rule would be unworkable as applied to officers' decisions to detain suspects. The line between a police encounter with a suspect and a detention is often a subtle one, depending on matters such as whether the officer touches the suspect or examines his identification and does not immediately return it. In this case, the district court found that the agents conducted a stop because, while respondent was waiting to enter a taxicab, one of the agents

[4] Respondent also cites (Br. 22) *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), but that case is wholly inapposite. That case held that border patrol officers cannot make random stops of vehicles in border areas, but can effect an investigative detention if there is reasonable suspicion that the vehicle contains illegal aliens. The Court did not suggest that an investigative detention would be unlawful if there is a less restrictive alternative available to the border patrol officers to determine whether a vehicle may be smuggling illegal aliens.

[5] In other contexts as well, the Court has held that "the real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps[.] * * * The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983) (emphasis in original). The reason is that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976). Accord *Colorado* v. *Bertine*, 479 U.S. 367, 373-375 (1987); *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

took respondent by the arm and guided him back to the sidewalk to be seated. Pet. App. 47a, 57a; J.A. 31-32. The officers' conduct in this case, while held to be a detention for Fourth Amendment purposes, was not so remote from the line between detentions and mere encounters, which do not constitute Fourth Amendment "seizures" at all, that the officers can be said to have obviously acted with undue force. Compare *INS* v. *Delgado*, 466 U.S. 210, 219-221 (1984) (agent tapped individual on the shoulder to get his attention and then questioned individual). While it is sensible to require that officers establish reasonable suspicion for a stop when they cross that line, it would impose extravagant and unjustified costs on law enforcement to adopt respondent's position, which would require suppression of evidence whenever law enforcement officers conducted a stop without first attempting a consensual encounter, regardless of the strength of the agents' suspicion. In this case, moreover, it is far from clear that the agents had any choice other than to detain respondent, since he had left the terminal and was about to board a taxicab when they stopped him.

3. Respondent contends (Br. 13-14, 23-28) that the facts known to the agents did not constitute reasonable suspicion that he was bringing cocaine back to Hawaii from Miami. For the reasons discussed in our opening brief (at 15-23), that claim is without merit. The evidence in this case is stronger than the evidence present in *Florida* v. *Royer*, *supra*, in which eight Members of this Court agreed that the officers had reasonable suspicion that the suspect was involved in narcotics smuggling. U.S. Br. 24-25. Respondent makes no effort to distinguish this case from *Royer*, and the argument that he does advance is flawed in several respects.

First, respondent overlooks or does not accurately characterize many of the facts known to the officers. Respondent did not merely pay for his airline tickets in cash. Rather, he purchased $2100 in tickets with a large roll of $20 bills, and he received half of that roll back from the airline ticket agent. Respondent did not merely fly to Miami for two days. Rather, he spent a day traveling 2100 miles from one tropical locale to another—which just happens to be the nation's principal source city for cocaine—for only a two-day stay. Respondent did not merely live at an address where the telephone was listed under someone else's name. Rather, he left a recording on the answering machine at that address.[6] And respondent did not merely appear nervous during his layover in Los Angeles on his return flight. Rather, he "appeared to be very nervous and was looking all around the waiting area." J.A. 43-44. Those additional cir-

[6] Respondent criticizes (Br. 26) the agents for not conducting a further inquiry in order to reconcile the inconsistency between the name that he gave to the airline (Andrew Kray) and the name under which his telephone was listed (Karl Herman). He argues that if the agents had done so, they would have learned that Karl Herman was his roommate, which would have eliminated the discrepancy. That argument is mystifying, because respondent *was* traveling under an alias. The agents would only have confirmed their suspicions if they had conducted the inquiry that he suggests.

There is also no merit to respondent's claim (Br. 26) that the agents' inference that he was using an alias is "irreconcilable" with the fact that he gave the airline his correct telephone number. There are at least two reasonable explanations for respondent's use of his true phone number. First, a false telephone number would surely have aroused suspicion if it had been checked. Second, when asked his phone number, respondent may have been too nervous to invent a false number on the spot.

cumstances are important, because they help to support the inference that respondent was not simply a member of the ordinary traveling public, but was engaged in wrongdoing.

Second, respondent ignores the fact that the agents did not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that he was involved in narcotics smuggling before they could briefly detain him. As we showed in our opening brief (at 13-14, 18-19, 27-28), to effect an investigative detention a law enforcement officer need only point to facts indicating that a crime "may be afoot" (*Terry* v. *Ohio*, 392 U.S. 1, 30 (1968)), which imposes only "some minimal level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. at 217. Even if the likelihood was less than 50-50 that respondent possessed cocaine (and if it was, it was not much less), the agents were entitled to act on that conclusion by briefly detaining him for questioning.[7]

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[7] The author of the article on which respondent heavily relies, Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. Rev. 843 (1985), makes the same mistake as respondent. The author criticizes the so-called drug courier profile in part because "[e]ven the most favorable figures cited by the agents fall far short of establishing the drug courier profile's validity." *Id.* at 876 (citing *Florida* v. *Royer*, 460 U.S. at 526 n.6 (Rehnquist, J., dissenting)). According to those figures, the author states that "fully 40% of the people ostensibly conforming to the profile and apparently subjected to some form of search or other investigation did not carry drugs." *Id.* at 876 n.136. An investigative technique that is correct 60% of the time, however, establishes more than reasonable suspicion; it establishes probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 235, 238, 243-244 n.13 (1983); U.S. Br. 27-28.

For the foregoing reasons and those given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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